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No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

THE WESTERN UNION TELEGRAPH COMPANY
Petitioner,

v.

WESTERN UNION INTERNATIONAL, INC.,
THE FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,
STATE OF HAWAII AND ITT WORLD COMMUNICATIONS INC.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEONARD GARMENT
MUDGE ROSE GUTHRIE &
ALEXANDER
Counsel for Petitioner
20 Broad Street
New York, New York 10005
Tel: (212) 422-6767

Of Counsel:
RICHARD C. HOSTETLER
JACK WERNER
JOEL YOHALEM
c/o The Western Union Telegraph Company
1828 "L" Street, N.W.
Washington, D.C. 20036
Tel: (202) 624-0140
LAURENCE URGENSON
Mudge Rose Guthrie & Alexander

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, The Western Union Telegraph Company (the "Telegraph Company") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on October 20, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra)* is reported at 544 F.2d 87. The Federal Communications Commission's Memorandum Opinion and Order (App. D, *infra)* is reported at 55 F.C.C. 2d 668.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on October 20, 1976. Timely petitions for rehearing and suggestions for rehearing *en banc,* filed by the Telegraph Company and the Commission, were denied on April 22, 1977, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2350(a).

QUESTION PRESENTED

Whether the Commission's power under §214 of the Communications Act of 1934, as amended, 47 U.S.C. §151 *et seq.,* to consider applications for authority to provide new forms of communications services—such as the Mailgram service jointly provided by the United States Postal Service and the Telegraph Company—is limited by Section 222(c)(2) of the Communications Act.

STATUTES INVOLVED

Sections 1, 2(a), 214, 222(a), 222(b) and 222(c), of the Communications Act, as amended, 47 U.S.C. §§151, 152(a), 214, 222(a), 222(b) and 222(c) as set forth in Appendix F, *infra.*

STATEMENT OF THE CASE

Pursuant to Section 214 of the Communications Act, the Telegraph Company filed an application with the Commission for authority to provide its new Mailgram[1] service

[1]Mailgram is essentially "electronic mail." The message is initiated by a customer by various means, including telephone, telex or TWX, over-the-counter and messenger. The Mailgram is then transmitted over Telegraph Company circuits to a computer switching center. There, the computer routes the Mailgram electroncially to the appropriate Post Office, where a postal employee takes the message from the teleprinter and puts it in the regular mails for delivery. *The Western Union Telegraph Company,* 55 F.C.C. 2d 668, 674 (1975) (App. D, *infra,* pp. 12-13).

to Hawaii. This case arises out of a decision by the majority of the Second Circuit panel below reversing the Commission's unanimous determination that it had the authority to consider the Telegraph Company's application. The jurisdiction of the court below was based on 47 U.S.C. §402(a), and 28 U.S.C. §§2342, 2343.

The Hawaiian Mailgram application confronted the Commission with an important and far-reaching question concerning competition in the international telegraph industry. Hawaii is an international point for the purposes of Section 222,[2] and, pursuant to Section 222(c)(2), the Telegraph Company had been required to divest itself of its international telegraph operations as a result of its 1943 merger with Postal Telegraph Inc.[3] At the urging of two international telegraph carriers, the Commission considered whether that section constitutes a permanent bar to the Telegraph Company's re-entry into the international market.

The Commission concluded that Section 222(c)(2) should be interpreted in a manner consistent with the other sections of the Communications Act which do not impose strict limitations on the Commission's authority but instead afford the Commission the flexibility required to achieve the Act's purposes despite changing circumstances. 55 F.C.C. 2d at 672 (App. D, *infra,* p. 10). The

[2]By a 1960 amendment to 47 U.S.C. §222(a)(10), Congress defined the continental United States as "the District of Columbia and the States of the Union, except Hawaii." 74 Stat. 411. Telegraph traffic with Hawaii was thus classified as international.

[3]Section 222(c)(2) provides in pertinent part as follows:

"Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger. . . ."

Commission determined that Section 222 did not reflect a Congressional intent to shield suppliers of international record services from competition and that the public interest would be served if the Telegraph Company were included among the potential suppliers of the new service to Hawaii.[4] 55 F.C.C. 2d at 672 (App. D, *infra,* p. 9). Relying upon the "theretofore carried on" language of Section 222(c)(2) and the legislative history, the Commission determined that that provision related only to international telegraph operations carried on as of 1943, the year Section 222 was enacted and the telegraph Company's merger with Postal Telegraph was consummated. Accordingly, the Commission held (1) that Section 222(c)(2) was not a bar to the Telegraph Company's furnishing new international telegraph services and therefore (2) that it had the authority and the responsibility to consider whether the Telegraph Company's application under Section 214[5] would, if granted, serve the public convenience and necessity.

The Second Circuit vacated and set aside the Commission's decision. Notwithstanding the "theretofore carried

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[4] In addition to the Telegraph Company, RCA Global Communications, Inc., Western Union International Inc., ITT World Communications, The Hawaiian Telephone Co. (in connection with the Telegraph Company) and The Domestic Satellite Corporation filed applications with the Commission for authority to provide a service similar to Mailgram to Hawaii. In its order the Commission merely decided that the Telegraph Company could pursue its application, and did not pass on the merits. 55 F.C.C. 2d at 673 (App. D, *infra,* pp. 10-11).

[5] Section 214 contains, *inter alia,* a broad grant of authority to the FCC to authorize the facilities needed to provide new services such as Mailgram where "the present or future public convenience or necessity require. . . ."

on" language of Section 222(c)(2), the majority concluded that that section applies to every form of record communications that has been devised since 1943 and to every form of such communications that may ever be developed in the future. 544 F.2d at 92-93 (App. A, *infra,* pp. 13-14). It also read the "divestment" requirement of Section 222(c)(2) as a continuing bar to the Telegraph Company's participation in international record communications. 544 F.2d at 93 (App. A, *infra,* p. 14). The court explicitly rejected the Commission's determination that Section 222(c)(2) should be read

> ". . . to make it consistent with other sections of the Communications Act which furnish only broad legislative goals and give the FCC 'broad and flexible powers to achieve those goals in the light of changing circumstances' "

544 F.2d at 91 (App. A, *infra,* p. 9).

Judge Mansfield dissented from the majority's decision because

> "both the plain language of §222 . . . and the circumstances surrounding its enactment make it clear that in authorizing [the Telegraph Company] and Postal Telegraph, Inc. . . . to merge, Congress did not bar the merged enterprise from ever again entering into any international operations. If Congress had wished to enact such a prohibition, it could easily have done so."

544 F.2d at 93 (App. A, *infra,* p. 15).

After explaining that the relevant legislative history "tends to point in the opposite direction" of the majority's holding, 544 F.2d at 94 (App. A, *infra,* p. 17), Judge

Mansfield concluded that the Commission's interpretation of the statute

> "is in keeping with the pattern and scheme of the Act, which is to set forth legislative objectives and give broad authority to the FCC, as the depository of expertise in the complex business of communications, to implement those principles and achieve the objectives in the light of changing technology and market developments. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 172-73, 88 S.Ct 1994, 20 L.Ed.2d 1001 (1968)".

544 F.2d. at 96 (App. A, *infra*, pp. 20-21).

REASONS FOR GRANTING THE WRIT

By interpreting the Communications Act in a manner in conflict with the view adopted by this Court, the decision below severely limits the Commission's ability to fulfill its statutory mandate and threatens to impose a structure upon the telegraph industry which is at odds with the Commission's determination of the public interest.

The question presented has produced the sharpest of divisions between the Second Circuit majority on the one hand and Judge Mansfield and a unanimous Federal Communications Commission on the other. If allowed to stand, the decision of the Second Circuit panel will deprive the Commission of the power to consider whether the Telegraph Company may provide Mailgram or any other telegraph (or "record") service internationally, even if the Telegraph Company were the best or the only entity capable of providing such services. This decision marks a break from, and will require reexamination of, a line of Commission opinions aimed at fostering competition in both domestic and international communications services.

The present case thus involves a question of importance to the administration of the Communications Act and to the future development of the telegraph communications industry.

A. *The decision below conflicts with the view of the Communications Act adopted by this Court.*

The majority's decision is contrary to the underlying rationale of the Communications Act and is inconsistent with this Court's view of the plan of the Act as described in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) and *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).[6]

In *Southwestern Cable Co., supra*, the Court recognized that in Section 2(a) of the Communications Act, 47 U.S.C. §152(a), Congress granted the Commission "unified jurisdiction" and "broad authority" over all interstate and foreign communication by wire or radio. 392 U.S. at 172. The rationale for this expansive delegation was that the complex and dynamic nature of the communications industry renders it impossible for Congress to provide for every future communications problem and development. 392 U.S. at 172-173. This Court has recognized that effective administration of the Communications Act requires that the Commission be afforded the flexibility necessary to regulate continually evolving uses of wire and radio transmission such as Mailgram.

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[6] *Southwestern Cable Co.* and *Midwest Video Corp.* involved the Commission's authority over matters affecting its regulation of broadcasting. This Court has noted that the Commission's authority over the telegraph industry is even broader than its authority over broadcasting. *United States* v. *Radio Corp. of America*, 358 U.S. 334, 348-50 (1959).

The majority below did not attempt to reconcile Section 222(c)(2) with the underlying scheme and purposes of the Communications Act, but instead concluded that:

> "Should the FCC wish further broad and flexible powers to adapt to changed circumstances, as may be the case here, Congress, and not this court, must be the one to grant the essential power."

544 F.2d at 91 (App. A, *infra*, p. 9).

By failing to give effect to the "therefore carried on" language of the statute and by reading the "divestment" requirement as a continuing bar, the court below needlessly imposes a significant restriction on the broad power granted the Commission under Section 214 to consider whether applications for facilities to provide new communications services will serve the public interest.[7] This approach squarely conflicts with the admonition in *Southwestern Cable* that courts should not

" 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.' "

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[7] As Judge Mansfield points out in his dissent, the majority's failure to give effect to the plain meaning of the "theretofore" provision of Section 222(c)(2) conflicts with this Court's statement that:

> " 'It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written.' *United States* v. *Great Northern Railway Co.*, 343 U.S. 562, 575, 72 S.Ct. 985, 993, 96 L.Ed. 1142 (1952). '[W]e are not free to adopt a construction which not only strains, but flatly contradicts the words of the statute.' *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418, 427, 92 S.Ct. 596, 601, 30 L.Ed.2d 575 (1972)."

544 F.2d at 93 (App. A, *infra*, p. 15).

392 U.S. at 177, quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968).

The conclusion of the majority below disregards the fact that Congress granted broad authority to the Commission over the communications industry to avoid the need for repeated Congressional revision and review of Commission authority. *Washington Utilities & Transp. Com'n* v. *F.C.C.*, 513 F. 2d 1142, 1157 (9th Cir. 1975); *National Ass'n of Theatre Owners* v. *F.C.C.*, 420 F. 2d 194, 199 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); *General Tel. Co. of California* v. *F.C.C.*, 413 F. 2d 390, 398 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). Indeed, if the majority's suggested remedy of Congressional revision should prevail, an "intolerable regulatory burden" would be placed on Congress the very burden "which [Congress] sought to escape by delegating administrative functions to the Commission." *General Tel. Co. of California* v. *F.C.C.*, *supra* at 398.

As stated by now Chief Justice Burger in the *General Telephone* case:

> "To give the [Communications] Act [an] overly restrictive interpretation . . . would be to prevent the Commission from employing the regulatory devices which have been established for effective common carrier control—a particularly sterile result when the carrier activity is augmenting the operations of parties which are the particular concern of the Commission's regulatory responsibility . . . . We have previously noted that the Commission's regulatory and enforcement powers should not be artificially fragmented or compartmentalized when the result would be to frustrate a comprehensive, pervasive regulatory scheme."

General Tel. Co. of California v. *F.C.C.*, *supra* at 402 (citations omitted).

B. The decision below severely limits the Commission's ability to fulfill its statutory mandate and threatens to impose a structure upon the telegraph industry which is at odds with the Commission's determination of the public interest.

If allowed to stand, the majority's decision will frustrate the Commission's efforts to fulfill the statutory mandate, relied on by this Court in *Southwestern Cable Co., supra* at 167, to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service . . . ." Communications Act, Section 1, 47 U.S.C. §151. The Commission's inability to consider the Telegraph Company's application to provide Mailgram service to Hawaii is itself a significant problem but it is not the only problem.

The Commission's decision here at issue is merely one element in a series of Commission actions aimed at fostering increased competition involving domestic and international carriers[8] with respect to the supply of new telegraphic services. The Commission's position has been that Section 222(c)(2) does not limit competition between the Telegraph Company and the international record carriers (the "IRCs") except with respect to tele-

[8] An international telegraph carrier is defined by Section 222(a)(3) of the Communications Act as

> "any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such term includes a corporation owning or controlling any such common carrier."

These carriers are also referred to as international record carriers or "IRCs". Today, the three largest IRCs are Western Union International ("WUI"), ITT World Communications ("ITT") and RCA Global Communications, Inc. ("RCA"). WUI is a corporation formed in 1963 to acquire the Telegraph Company's international cable system and is in no way affiliated with the Telegraph Company.

graph services "theretofore carried on"—*i.e.* services provided by the Telegraph Company and Postal Telegraph at the time of the 1943 merger. This construction of the statute has not been confined solely to the Mailgram order under review. By so construing Section 222, the Commission has justified the entry of the three largest IRCs into the marketplace for domestic record communications services.[9] If the decision below stands, the Commission would seem obliged, at least as a matter of logic and fairness, to revisit the policy underlying these grants of authority. And even if it be argued that the principle of *res judicata* insulates the existing certifications from review, it is apparent that a reexamination will be required as soon as the affected carriers apply under Section 214 for additional authorizations.[10] At that juncture the Commission may be required to deny the new applications even if the provision of additional services would be in the public interest. Thus the impact of the decision below will not necessarily be limited to the Telegraph Company, but will tend to reduce competition generally and deny communications services to both domestic and international users.

The Second Circuit majority suggests that its decision may be reconciled with the entry of IRCs into the domestic market because its decision is consistent with the Commission's view that Section 222 was not intended to

[9] The IRCs and their affiliates were authorized to engage in domestic services, on the ground that the record services they provide are not the type of record services "theretofore carried on" by the Telegraph Company in 1943. *RCA Global Communications, Inc.*, 42 F.C.C. 2d 774, 780 (1973); *American Satellite Corp.*, 43 F.C.C. 2d 348, 353-54 (1973) (WUI subsequently withdrew from the American Satellite venture); *United States Transmission Systems, Inc.*, 48 F.C.C. 2d 859, 862 (1974).

[10] New facilities are added on a regular basis by all carriers, to meet increasing demands for service and to extend service to new routes. Section 214 applies in both instances.

protect the Telegraph Company from domestic competition. 544 F.2d at 91 n.l (App. A, *infra,* p. 10 n.1). This ignores that the majority presumes the existence of a Telegraph Company domestic service monopoly: permanent withdrawal from the international market is described as the "price paid by the [Telegraph Company] for the acquisition of a domestic monopoly over telegraph service." 544 F.2d at 93 (App. A, *infra,* p. 14). One necessary counterpart of such a monopoly is total exclusion of the IRCs from the domestic market. Indeed, in its petition for rehearing below, the Commission recognized that a "total separation of the domestic and international markets" is "implicit in the majority holding" (p. 10).

The decision below strips the Commission of important powers granted by Congress and rigidly structures the telegraph industry in a manner not only at odds with the Commission's view of the public interest in this case, but in conflict with an entire line of decisions aimed at broadening competition among suppliers of record communications services. The decision seriously and unnecessarily impairs the Commission's ability to protect the public interest with respect to the development of competition in both the international and domestic communications markets. Review by this Court is thus plainly warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD GARMENT
MUDGE ROSE GUTHRIE & ALEXANDER
Counsel for Petitioner
20 Broad Street
New York, New York 10005
Tel.: (212) 422-6767

Of Counsel:

RICHARD C. HOSTETLER
JACK WERNER
JOEL YOHALEM
c/o The Western Union Telegraph Company
1828 "L" Street, N.W.
Washington, D. C. 20036
Tel: (202) 624-0140

LAURENCE URGENSON
Mudge Rose Guthrie & Alexander

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 6—September Term, 1976.

(Argued September 13, 1976 Decided October 20, 1976.)

Docket No. 75-4132

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,

v.

THE FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents,

THE WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII and ITT WORLD COMMUNICATIONS INC.,
Intervenors.

Before:

ANDERSON, MANSFIELD AND MULLIGAN,
Circuit Judges.

Petition by Western Union International, Inc. for review of opinion and order of the Federal Communications Commission, which decided that Title 47 U.S.C. §222(c)(2) does not bar the Western Union Telegraph Company's application for leave to establish and operate its mailgram service to Hawaii.

Petition granted and order vacated and set aside.

ALVIN K. HELLERSTEIN, Esq., New York, N.Y. (Stroock & Stroock & Lavan, Henry J. Silberberg, Esq., Alan Kolod, Esq., Robert E. Conn, Esq., and Roger P. Newell, Esq., New York, N.Y., on the brief), *for Petitioner.*

JOSEPH MARINO, Esq. (Ashton R. Hardy, General Counsel, Daniel M. Armstrong, Associate General Counsel, and Lawrence S. Schaffner, Counsel, Federal Communications Commission, Washington, D.C.; and Thomas E. Kaufer, Assistant Attorney General, Carl D. Lawson, Esq., and Lee I. Weintraub, Esq., Department of Justice, Washington, D.C., on the brief), *for Respondents.*

CHARLES P. SIFTON, Esq., New York, N.Y. (LeBoeuf, Lamb, Leiby & MacRae, John S. Kinzey, Esq., Howard A. White, Esq., and John A. Ligon, Esq., New York, N.Y., on the brief), *for Intervenor ITT World Communications, Inc.*

(ROSEL H. HYDE, Esq., HERBERT E. MARKS, Esq., MICHAEL B. GREEN, Esq., Wilkinson, Cragun & Barker, Washington, D.C., *on the brief for Intervenor State of Hawaii.)*

MILTON BLACK, Esq., Washington, D.C. (Mudge Rose Guthrie & Alexander, New York, N.Y., Donald J. Zoeller, Esq., Joseph H. Stallings, Esq., Jack Werner, Esq., and Joel Yohalem, Esq., Washington, D.C., on the brief), *for Intervenor The Western Union Telegraph Company.*

ANDERSON, *Circuit Judge:*

This is a petition for review of a memorandum opinion and order of The Federal Communications Commission (FCC) in the matter of *The Western Union Telegraph Co.*, 55 F.C.C.2d 668 (1975). The FCC decided that Western Union Telegraph Co. (WU) might apply for authority, pursuant to 47 U.S.C. §214 (1970), to lease and operate facilities between the 48 contiguous United States and the District of Columbia, and the State of Hawaii for the purpose of extending WU's mailgram service to Hawaii. For the reaons set out below, the FCC's order is set aside.

A mailgram, in the words of the FCC opinion, is essentially "electronic mail." The message is picked up from a customer by various means, including telephone, telex, over-the-counter and messenger. The mailgram is then transmitted over WU circuits to its computer switching center in Middletown, Virginia. There the computer

routes the mailgram over circuits specifically dedicated to this particular service, to a preselected Post Office, where a postal employee takes the message from the teleprinter and puts it in the regular mails.

Mailgram service within the continental United States began on January 1, 1970 for an experimental, two-year period, *United Telegraph Workers, AFL-CIO* v. *FCC,* 436 F.2d 920, 921 (D.C. Cir. 1970). At the time of the FCC order in this case, there were pending before it applications for authority to provide a service similar to mailgrams filed by RCA, ITT, WUI (totally separate company from WU), the Hawaiian Telephone Co. in connection with WU and The Domestic Satellite Corp.

The contemporary American telegraph industry is made up of domestic and international "record carriers." WU is the sole domestic carrier of telegrams, while international record carriers (IRCS), which include Petitioner WUI and intervenor ITT World Communications, Inc. (ITT), traffic only in messages between the continental United States and abroad. For the purposes of accepting and delivering international telegraph messages, IRCS may maintain public offices, pursuant to 47 U.S.C. §222(a)(5), in certain FCC-designated cities of the United States known as "gateway" cities. Messages for delivery abroad which originate within the United States in other than gateway cities will generally be placed with a local WU office in the "hinterland." From there, the message will travel by WU lines to an office of an IRC and thereafter to its final destination abroad. WU distributes messages placed with it for foreign delivery with competing international carriers by use of a formula derived pursuant to 47 U.S.C. §222(e)(1).

This peculiar industry structure came about primarily through the enactment, in 1943, of 47 U.S.C. §222, which

deals with the permissive consolidations and mergers of telegraph carriers. WU came within the provisions of this statute as a result of its 1943 merger with the failing Postal Telegraph Co., *Western Union Divestment,* 30 F.C.C. 323, 325 (1961). Section 222(b)(1) allows the merger or consolidation of any two or more domestic telegraph carriers, but §222(c)(2) goes on to provide in pertinent part:

> "(2) Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the *international telegraph operations theretofore carried on* by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission. . . ." (Emphasis added.)

International telegraph operations are defined by the statute as "record communications by wire or radio" originating or terminating at points outside the "continental United States." 47 U.S.C. §222(a)(6). By a 1960 amendment to 47 U.S.C. §222(a)(10), Congress defined the continental United States as the States of the Union and the District of Columbia, but, for this purpose, excluded Hawaii. *See* 2 U.S. Code Cong. & Adm. News, 2963, 2979-80 (1960). Telegraph traffic with Hawaii was thus classified as an international operation open only to IRCS.

Given this background, the Common Carrier Bureau, in an April 19, 1972 decision by its Chief, initially disallowed WU's application to provide mailgram service to Hawaii. The Bureau's decision was grounded on its interpretation of the legislative history of §222, which led it to conclude that Congress' intent in enacting "the divestment requirement set out in Section 222(a)(2) [sic] . . . [was] to preclude WUTC from engaging in future 'international

telegraph operations' as that term is defined in Section 222." The Bureau thus rejected an argument, posited by WU, and renewed by it before this court, that when Congress provided in §222(c)(2) that a merged domestic telegraph carrier was to divest itself of international telegraph operations "theretofore carried on," it was intended only that WU divest itself of international services and operations in existence *as of 1943,* the effective date of the statute and of the WU-Postal Telegraph merger. It further argued that, because mailgrams were not in existence in 1943 and could, therefore, be called a "new" service, different from the traditional telegraph operations carried on in 1943, §222(c)(2) did not apply to the present case. In addition to the legislative history, the Bureau relied on the FCC's decision in *Telegraph Service with Hawaii,* 28 F.C.C. 599 (1960), discussed *infra.*

The FCC's reversal of the Common Carrier Bureau's decision entailed a finding that Congress' concern in 1943 was simply "to remedy the problems which were [then] facing the troubled telegraph industry. . .," *The Western Union Telegraph Co., supra,* 55 F.C.C.2d at 672, so that it could find

> ". . . nothing in the statute or its legislative history which mandates a broad interpretation of the divestment clause such as to disqualify WU from providing the proposed Mailgram service to Hawaii." *Id.* at 671.

The FCC first argued for a reading of the divestiture section, §222(c)(2), consistent with other sections of the Communications Act, setting down only "broad legislative goals" and allowing the FCC broad and flexible powers to achieve those goals "in the light of changing circumstances." Secondly, the FCC found in an appendix to its

opinion that the "theretofore" language of the divestiture requirement "should be interpreted to apply only to the types of operations engaged in by WU at the time of the merger in 1943." *Id.* at 677. Accordingly, the FCC held that it had the authority to allow WU to re-enter international operations for the first time since divestment of the company's international facilities in 1963, because mailgrams were a new service distinct from those offered in 1943.

The FCC is correct in presenting for decision here, only the "narrow legal question" of whether §222(c)(2) constitutes a ban on the potential re-entry of WU into international operations through the company's applications for mailgram service to Hawaii. A review of the FCC's legal conclusions and the rationale leading up to them, *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 91 (1953), disclose that the Commission erred in deciding the issue as it did.

In determining the meaning of §222, it is necessary to give careful consideration to its legislative history. *Train* v. *Colorado Public Interest Group,* 96 S. Ct. Rep. 1938, 1942 (1976); *Lynch* v. *Overholser,* 369 U.S. 705, 710 (1962); *Federal Maritime Commission* v. *DeSmedt,* 366 F.2d 464, 469 (2 Cir. 1966), *cert. denied,* 385 U.S. 974 (1966). The origins of §222 lie primarily in the economic difficulties facing the American telegraph industry during the depression of the 1930's. Most affected of the large domestic telegraph carriers was Postal Telegraph Co., which borrowed heavily from The Reconstruction Finance Corporation, but, in spite of this aid, continued on the verge of financial collapse. Under these circumstances Congress, in 1939, launched a study of the telegraph industry with the passage of Senate Resolution 95. That study, reported as S. Rep. No. 769, (*Study of the Tele-*

graph Industry), 77th Cong., 1st Sess. (1941), resulted in the recommendation that Congress allow domestic American telegraph carriers to merge, but with a proviso that ". . . there should be no merger between or common control of domestic and international communications carriers but permitting a merger of domestic carriers into one entity and international carriers into a second and entirely separate and distinct entity . . . ." *Id.* at 25. As to operations of the merged entity, the Committee proposed:

> "(d) The legislation should define 'domestic' and 'international' carriers and shall not prevent the inclusion of all existing operations of any domestic carrier, which may be engaged partially in international telegraph communications, into the merged domestic enterprise, *and shall empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself solely to domestic telegraph operations if found to be in the public interest." Id.* (Emphasis added.)

The reasons for such restrictions on the merged domestic carrier was that, with the demise of Postal Telegraph Company, WU was expected to acquire a monopoly in "ordinary commercial messenger business within the United States." *Id.* at 20. WU also had extensive international operations. It could, therefore, by coordinating both aspects of its business, seriously damage the interests of competing international carriers, contrary to 47 U.S.C. §314.

These Senate recommendations were embodied in S. 2445—a proposed, but not enacted, version of §222—which would have allowed the merger of domestic and international carriers, respectively, into two separate entities. As for the restriction on international operations

placed on the domestic carrier, the language of this bill was changed to "require" the FCC to bring about complete divestment "of all such international telegraph operations." *Hearings on S. 2445 Before a Sub-Committee of the Senate Committee on Interstate Commerce, (Consolidations and Mergers of Telegraph Operations)* 77th Cong., 2d Sess. at 253 (1942). The final version of §222(c)(2), quoted *supra*, left the FCC with only the authority to fix the time for divestiture. In short, the evolving language of the statute itself militates against a reading of §222(c)(2), as the FCC read it, to make it consistent with other sections of the Communications Act which furnish only broad legislative goals and give the FCC "broad and flexible powers to achieve those goals in the light of changing circumstances." Instead, in enacting this governing statute, Congress granted the FCC only the power to fix, in its discretion, the time within which the divestiture of international operations by domestic merged entities was to be accomplished. Should the FCC wish further broad and flexible powers to adapt to changed circumstances, as may be the case here, Congress, and not this court, must be the one to grant the essential power.

Subsequent interpretations of §222(c)(2) by the FCC bear out the Commission's lack of discretion in applying this statute. In *Telegraph Service with Hawaii*, 28 F.C.C. 599, 605, *aff'd on reconsideration*, 29 F.C.C. 714 (1960), the FCC ruled that §222 did not allow WU to provide telegraph service to the islands upon Hawaii's admission as a State as part of WU's domestic telegraph operations. The FCC there felt that WU's interpretation of the statute, which would have included an evaluation of the public interest in allowing such a service, was incorrect. Instead, the FCC found that the history and purpose of §222 did not give rise to any "doubts as to means" so that the FCC could not allow WU to provide such a service "no matter how urgent the public interest." 28 F.C.C. at 605. Again

Congress was there cited as the only competent body to deal with WU's request. Further, one year after its decision in *Telegraph Service with Hawaii, supra,* the FCC found in *Western Union Divestment,* 30 F.C.C. 323, 340 (1961), that it was the intent of Congress in enacting §222 to achieve a complete divorcement of domestic carriers from all financial interest in international telegraph operations. The FCC's 1960 and 1961 reading of §222 are simply inconsistent with its current view[1] by which the

[1] The FCC supported its current reading of §222(c)(2) through *American Satellite Corporation,* 43 F.C.C.2d 348, 353-54 (1973) and *RCA Global Communications, Inc.,* 42 F.C.C.2d 774, 780 (1973). In *American Satellite,* the Commission did cite the "theretofore carried on" language of §222(c)(2) to explain that the term "record communications by wire or radio" as used in §222(a)(5) (the definition of "domestic telegraph operations") was intended to embrace those types of services being carried on by WU at the time of the merger. However, the case revolved around whether American Satellite, a new company owned jointly by Fairchild Industries and Western Union International, could receive authorization to lease satellite channels from Telestat Canada for domestic communications facilities. WU opposed the application on the grounds that WUI's 20% ownership of American Satellite constituted a merger between an international carrier (WUI) and a domestic carrier (American Satellite), contrary to §222(c)(2). This objection did not succeed, because the Commission did *not* find that American Satellite was a domestic carrier. As an international carrier, American Satellite could compete with WU domestically, because ". . . the legislative intent [of §222] was not to protect Western Union from competition in the domestic communications market. Rather, it was the intent of Congress to preserve the then existing competition in international communications which might be lessened or extinguished by the creation of the domestic telegraph monopoly authorized by Congress." 43 F.C.C.2d at 355. Such a view of §222 by the Commission which would continue to keep WU out of international operations is consistent with this court's view of the statute. The thrust of *RCA Global, supra,* is much the same as in *American Satellite, supra.*

Commission has now endowed itself with the power to include an evaluation of the public interest in allowing WU to file its application for mailgram service—an admittedly international operation by a domestic carrier. Accordingly, no special weight can be placed on the FCC's latest interpretation of §222, *United Housing Foundation Inc.* v. *Forman,* 421 U.S. 837, 858 n. 25 (1975), as would otherwise be the case, *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 121 (1973).

Continuing the analysis of the legislative history of §222, we now turn to the second issue raised by the FCC order which is whether §222(c)(2)'s divestiture requirement applied only to record (non-voice) services provided by WU in 1943. This construction of §222 would allow WU to apply for mailgram service to Hawaii, because the FCC has found that while the mailgram is "clearly a record service," it is nonetheless a "new service distinct from those offered in 1943." Implicit therein is the view that the statute was solely applicable to the industry's problems and operations literally and precisely as they existed in 1943 and that the legislation was not meant to have any prospective application. This court is satisfied, however, that there is no basis whatever in the legislative history to support so limited and strained a construction.

The 1942 congressional hearings on S. 2445, one of two predecessors to the current §222, reveal that the FCC at that time considered the legislation as the beginning of a major and long-term reorganization of the telegraph industry. FCC Chairman James L. Fly told the Committee that:

> "As time has gone on, I must say that I have become more and more impressed with the utter necessity,

> and I think at an early date, of having an effective worldwide scheme of communications. . . . [The need] is pretty acute in time of war. . . .
>
> But it is going to be immensely important when this war is over." *Hearings on S. 2445 Before a Subcommittee of the Senate Committee on Interstate Commerce, (Consolidations and Mergers of Telegraph Operations)* 77th Cong., 2d Sess. at 253 (1942).

FCC Commissioner Clifford T. Durr, likewise saw the legislation as a "long step" toward the creation of a domestic industry comprised of only a single domestic and a single international carrier. *Id.* at 14. Moreover, around this time the affected domestic companies, including WU, evidently suggested that they be allowed to retain "international facilities." Chairman Fly disagreed and said:

> "I strongly feel that we ought to do a clean job of handling this problem. . . . [I]f we decide that as a matter of policy that there should be a domestic monoply . . . then I do think we ought to do a clean job of it." *Id.* at 258.

At the urging of the Navy Department, however, S. 2445 was changed from a measure authorizing mergers of both domestic and international carriers to one allowing only mergers among domestic carriers. S. Rep. No. 1490, 77th Cong., 2d Sess. at 8 (1942). At the House hearings on the new measure, S. 2598, FCC Chairman Fly again commented that "we do not want the domestic company to have any international arrangements; that is, any international properties or operations." *Hearings Pursuant to S. 2598 Before a Subcommittee of the House Committee on Interstate & Foreign Commerce, (Consolidations and Mergers of Telegraph Operations)*, 77th Cong., 2d Sess. at 16 (1942).

The plain import of these statements, when taken together with the evolving language of the statute as discussed *supra,* leads to the conclusion that the intent and purpose of Congress in enacting §222(c)(2) was more than simply barring domestic carriers from engaging in the particular international operations and services that were being provided in 1943. The FCC's heavy reliance on the "theretofore" language of §222(c)(2), *supra,* is, therefore, unjustified. The word "theretofore" must be placed in its proper context by looking at the legislative history as a whole, *Tidewater Oil Co.* v. *United States,* 409 U.S. 151, 157 (1972), which does not reveal an intent by Congress to use the word as a line of demarcation for the types of international record services which WU could or could not engage in after the merger with Postal Telegraph. To hold otherwise would not only give the word "theretofore" a strained meaning, but would imply that WU could defeat the import of the congressional scheme of §222 by re-entering international operations shortly after its mandated divestiture by developing or acquiring interests in modes of record communications, other than standard telegraph service, not engaged in by the company in 1943. *See also, The Western Union Telegraph Co., supra,* 55 F.C.C.2d at 680. Congress was, of course, aware of forms of record message services other than telegrams during the period when this legislation was under study, including the Bell System's TWX, a teletypewriter exchange service, and its leased-wire service. *See Recommendations of Three Proposed Amendments to the Communications Act of 1934,* H. Doc. No. 83, 74th Cong., 1st Sess. at 5 (1935) and *Hearings pursuant to S. No. 95 Before a Subcommittee of The Senate Committee on Interstate Commerce, (Statement of FCC Chairman Fly),* 77th Cong., 1st Sess. at 5, 19 (1941).

It is clear that in 1962 WU was in full agreement with this court's present interpretation of §222(c)(2). This is evidenced by WU's attempt in that year to bring about the repeal of that section. The thrust of the bill, which was never enacted into law, was to allow WU to compete with A. T. & T. by engaging in international data transmission, which, like mailgrams, was a new type of record service. The FCC opposed such a repeal. This action shows that at that time the FCC was of the opinion that §222(c)(2) was intended to preclude WU from engaging in international record services in existence prior *and subsequent to* 1943.

In short, §222(c)(2)'s directive as to the divestment by the merged domestic carrier (WU) of "international telegraph operations theretofore carried on by any party to the consolidation or merger" was meant as a continuing bar to WU's involvement in international record communications which would include mailgrams. This was the price paid by the company for the acquisition of a domestic monopoly over telegraph service. Accordingly, the issue of whether mailgrams are a "new" form of record service unknown to the drafters of the 1943 legislation need not be reached or discussed.

Thus, consistent with the Circuit's earlier opinion in *Western Union Telegraph Co.* v. *United States,* 267 F.2d 715, 718 (2 Cir. 1959), §222(c)(2) precludes the FCC's consideration of an application by The Western Union Telegraph Co. to provide an admittedly international record service to Hawaii. In the light of the disposition of the case, the merits of antitrust allegations urged by intervenor ITT World Communications Inc. need not be discussed or commented upon.

Because it was Congress that enacted the statute and imposed this ban on WU, it is only Congress that, under the circumstances of this case, can change it.

The order of the FCC is vacated and set aside.

MANSFIELD, *Circuit Judge* (Dissenting):

I respectfully dissent for the reason that both the plain language of §222 of the Federal Communications Act of 1934 ("Act") and the circumstances surrounding its enactment make it clear that in authorizing Western Union Telegraph Company ("WU") and Postal Telegraph, Inc. ("PT") to merge, Congress did not bar the merged enterprise from ever again entering into any international operations. If Congress had wished to enact such a prohibition, it could easily have done so. All it had to do was to provide that following divestiture the merged enterprise should not engage in international operations or that it should be restricted to domestic service. But it did not do this. Instead, it simply required that the merged enterprise divest itself of those *"international operations theretofore carried on."* The term "theretofore" can only mean "up to that time," "until then," or "before then," see Webster's Third International Dict. (1961 ed.) 2372; *Hume* v. *United States,* 118 Fed. 689, 696 (5th Cir. 1902). It cannot fairly be construed as meaning "thereafter." As the Supreme Court has stated, "It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States* v. *Great Northern Railway Co.,* 343 U.S. 562, 575 (1952). "[W]e are not free to adopt a construction which not only strains, but flatly contradicts, the words of the statute," *Reliance Electric Co.* v. *Emerson Electric Co.,* 404 U.S. 418, 427 (1972).

Congress thus left open the question of whether, with changing market conditions, circumstances and technologies, some international operations by WU might after divestiture be authorized by the Federal Communications Commission as being in the public interest. Since WU has complied with the divestiture requirement, that obligation has been fulfilled, and the FCC is no longer barred from authorizing the proposed mailgram service to Hawaii, an international point. I would therefore affirm the Commission's order.

That Congress intended to restrict itself to dealing with the telegraphic industry in its contemporary pattern is attested to not only by the statute's plain language but by the circumstances surrounding the enactment of §222. Although the statute is couched in terms that embrace any merger of telegraphic carriers generally, it is undisputed that the law was in fact aimed at authorizing the proposed merger of WU with its financially ailing competitor, PT, which had continued to lose money despite government subsidization through the Reconstruction Finance Corp. See H.R. Rep. No. 2664, 77th Cong., 2d Sess. 3-4 (1942), S. Rep. No. 1490, 77th Cong., 2d Sess. 1 (1942). These two companies represented the country's sole domestic telegraphic services except for certain limited types of service (leased wire, teletypewriter and telephone) offered by American Telephone & Telegraph Company. If PT should fail, the United States would lose an essential telegraphic service. Sen. Res. 75, 76th Cong., 1st Sess. 1939. Congressional authority for the proposed merger was required because the merger otherwise would violate §314 of the Act, 47 U.S.C. §314.

Since the WU-PT merger would create overnight a giant domestic-international telegraphic enterprise possessing a domestic monopoly over pick-up and delivery of

international messages, which could be used unfairly to favor its international cables division as against the overseas services of other international carriers, some protection against this immediate potential for abuse was deemed advisable. The means chosen were to require divestiture of the merged company's international operations and, pending divestiture, to impose upon WU a formula for equitable distribution among international carriers of international traffic picked up by WU for transmittal overseas. Not a word was said about depriving the Commission of its discretionary power under §214 of the Act to authorize in the future such specific international operations by WU as might be found to be in the public interest.

Congress thus viewed divestiture as sufficient to eliminate any immediate anticompetitive consequences from the merger and saw the Commission's continued exercise of its broad discretionary powers and expertise as sufficient to safeguard against any reentry by WU that might tend to cause an undue restraint on competition. In the meantime, competition on the part of international carriers would be given a chance to flourish.

Normally, where the plain meaning of a statute is clear legislative history, even if indicating a different intent, will not justify a departure from that meaning. See *Caminetti* v. *United States,* 242 U.S. 470, 485 (1917). Here, however, the legislative history of §222, far from lending support to the majority's position, tends to point in the opposite direction. The excerpts of testimony selected by the majority from statements of those who appeared in the course of Committee hearings extending over a period of years are at best ambiguous. Furthermore, being the statements of individuals rather than of Congressional committees or members, they hardly reflect the views of

the Senate and House Committees reporting on the proposed legislation, much less those of Congress. When we turn to the Committee reports, as distinguished from such testimony, we find that there was never any recommendation to the effect that the merged enterprise be barred from international operations. At most the Senate Committee on Interstate Commerce recommended that the Commission be given the power to restrict the merged enterprise to domestic operations if such a restriction should be "found to be in the public interest." S. Rep. No. 769, p. 25. Thereafter the successive drafts of §222 as they progressed through Congress toward final enactment all contained the language "theretofore carried on." See S. 158, 78th Cong., 1st Sess. (1943); S. 2598, 77th Cong., 2d Sess. (1942); S. 2445, 77th Cong., 2d Sess. (1942). Thus the legislative history, to the extent that it sheds any light on the issue, indicates that Congress meant what it said when it used the phrase "theretofore carried on" and left it to the Commission to determine in its discretion whether WU might be permitted to enter the international market "if found to be in the public interest" or, for that matter, whether an international carrier might expand by growth (as distinguished from merger) into the domestic market.[1]

Just as divestiture in the antitrust context is not normally a bar to future competition through growth on the part of the divested company, at least in the absence of a specific prohibition against reentry, see, e.g., *Maryland & Virginia Milk Producers Assn.* v. *United States,* 362 U.S. 458, 462, 472-73 (1960); *Schine Chain Theaters, Inc.* v. *United States,* 334 U.S. 110, 127, 130 (1948); *United*

[1] Section 222 of the Communications Act, 47 U.S.C. §222, is limited to placing restrictions on consolidations and mergers. It does not restrict expansion by a domestic or international carrier through growth.

States v. *Crescent Amusement Co.,* 323 U.S. 173, 186 (1944), so here Congress was apparently satisifed to allow the Commission to determine in the exercise of its broad authority whether WU might enter the international area, and, if so, to what extent. Any such determination would, of course, require the Commission to weigh the advantages to the public of permitting a specific or limited reentry against any risk of abuse of domestic monopoly power on the part of WU. As competitive conditions, marketing methods and technology (including the development of alternate-voice data transmission) might change, such flexibility would be both desirable and in the public interest, especially since new methods of protecting international carriers against unfair competition might be devised. For instance, it now appears that the FCC could promote competition in the transmittal of mailgrams to Hawaii (1) by expanding the international gateways in the United States and permitting international carriers to absorb the cost of transmitting messages domestically by phone, telex or TWIX to such gateways, thus providing "paid direct access" to all domestic points in the United States, see *International Record Carriers' Communications,* 40 F.C.C.2d 1082, 1083 (1973), and (2) by granting Hawaii mailgram rights to one or more international carriers.[2] In view of these changing circumstances, §222, to the extent that it might restrain competition on the part of WU against the international carriers, should be construed strictly, see *United States* v. *Masonite,* 316 U.S. 265, 280 (1942).

[2] Since 1972, WUI, RCA and ITT have applied to the Commission for permission to provide services similar to WU's mailgram service between the continental United States and various international points, including Hawaii.

Nor does *Telegraphic Service With Hawaii,* 28 F.C.C. 599, *affd. on reconsideration,* 29 F.C.C. 714 (1960), provide any substantial support for the majority's construction of §222. Although the Commission in that proceeding stated in passing that §222 precluded WU from engaging in competition with international carriers to overseas points, the statement was made in connection with its consideration of whether Hawaii might be treated as a domestic rather than as an international point. Furthermore, since the statement was made before WU's divestiture of its international operations, which did not occur until 1963, the Commission apparently assumed that since Hawaii remained an international point any WU service to Hawaii would be subject to the outstanding divestiture order. However, since WU has now complied with the divestiture order, it no longer applies. To the extent that the Commission's statement in *Telegraphic Service With Hawaii* is offered as an interpretation of §222 supporting the majority's position here, it has been greatly eroded by the Commission's decisions in later cases, see *American Satellite Corp.,* 43 F.C.C.2d 348, 353 (1973); *RCA Global Communications, Inc.,* 42 F.C.C.2d 774, 780 (1973), and as a practical matter overruled by its decision in the present case. In view of this conflict, whatever weight might otherwise be accorded to the Commission's earlier interpretation of its own statute, see *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 203 (1956), has been dissipated by its later construction. See *United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837, 858-59 n.25 (1975).

In short, the Commission's conclusion that it has authority to consider WU's application here is in keeping with the pattern and scheme of the Act, which is to set forth legislative objectives and give broad authority to the

FCC, as the depository of expertise in the complex business of communications, to implement those principles and achieve the objectives in the light of changing technology and market developments. See *United States* v. *Southwestern Cable,* 392 U.S. 157, 172-73 (1968). The public interest would not be served by treating §222(c)(ii) as a straitjacket that would preclude WU's provision of international mailgram service where the grant of a certificate to provide such service to Hawaii would be in the public interest and would not violate the plain language of §222. I would therefore affirm the Commission's order.

APPENDIX B
JUDGMENT

United States Court of Appeals
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 20th day of October, one thousand nine hundred and seventy-six.

Present:

HON. ROBERT P. ANDERSON,

HON. WALTER R. MANSFIELD,

HON. WILLIAM H. MULLIGAN, C.JJ.
Circuit Judges.

WESTERN UNION INTERNATIONAL, INC.
Petitioner,

v.

THE FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,
Respondents,

75-4132

WESTERN UNION TELEGRAPH COMPANY, STATE OF HAWAII AND ITT WORLD COMMUNICATIONS INC.
Intervenors.

A petition for review of an order of the Federal Communications Commission.

This cause came on to be heard and was argued by counsel

Upon consideration thereof, it is now hereby ordered, adjudged and decreed that said petition to review be and it hereby is granted and that the said order be and it hereby is vacated and set aside.

A. DANIEL FUSARO,
Clerk

By: VINCENT A CURTAIN
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of April, one thousand nine hundred and seventy-seven.

Present:

HON. WALTER R. MANSFIELD,
HON. WILLIAM H. MULLIGAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,

Respondents.

Docket No. 75-4132

A petition for a rehearing having been filed herein by counsel for the respondent (Western Union Telegraph Company).

Upon consideration thereof, it is Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of April, one thousand nine hundred and seventy-seven.

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA,

Respondents.

Docket No. 75-4132

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the respondent (Western Union Telegraph Company), and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of April, one thousand nine hundred and seventy-seven.

Present:

HON. WALTER R. MANSFIELD,
HON. WILLIAM H. MULLIGAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA,

Respondents.

Docket No. 75-4132

A petition for a rehearing having been filed herein by counsel for the respondent (Federal Communications Commission).

Upon consideration thereof, it is Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of April, one thousand nine hundred and seventy-seven.

WESTERN UNION INTERNATIONAL, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,

Respondents.

Docket No. 75-4132

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the respondent (Federal Communications Commission), and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge.

APPENDIX D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of
THE WESTERN UNION TELEGRAPH CO.
Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, To Lease and To Operate Facilities To Extend Mailgram Service Between the U.S. Mainland and Hawaii

MEMORANDUM OPINION AND ORDER

(Adopted June 11, 1975; Released June 23, 1975)

BY THE COMMISSION: COMMISSIONER REID CONCURRING AND ISSUING A STATEMENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. The Commission is herein considering:

(a) An application for Review of Action taken Pursuant to Delegated Authority filed by The Western Union Telegraph Company (WU) on May 19, 1972, requesting that the Commission, pursuant to Section 1.115 of our Rules and Regulations, review the determination made by the Chief, Common Carrier Bureau (Bureau), that WU is prohibited by Section 222 of the Communications Act of 1934, 47 U.S.C. §222 (1971), from leasing and operating facilities to extend Mailgram

service between the United States Mainland and Hawaii;[1]

(b) An Opposition to WU's Application for Review (Opposition) filed by RCA Global Communications, Inc. (RCA) on June 26, 1972, urging that the Bureau was correct in its determination that Section 222 is an absolute bar to WU's engaging in any overseas telegraph operations;

(c) A petition for Waiver filed pursuant to Section 1.3 of the Commission's Rules and Regulations, 47 C.F.R. §1.3 (1973), by Western Union International, Inc. (WUI) on June 26, 1972, requesting that the Commission waive the requirements set forth in Sections 1.115(f) and 1.49 of its Rules;

(d) A Petition of WUI to Dismiss or Deny (WU's) Application for Review (Petition) filed June 26, 1972, asserting that as a matter of law, under Section 222, WU is precluded from providing international record services;

(e) A Reply by WU to the RCA Opposition and the WUI Petition to dismiss its Application for Review (Reply), filed July 25, 1972;

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[1] On April 4, 1972, WU filed an Application for Authority Pursuant to Section 214 of the Communications Act to lease and operate facilities to extend Mailgram service between the United States and Hawaii. The Chief, Common Carrier Bureau, pursuant to Section 0.294 (now 0.291) of the Commission's Rules and Regulations, 47 C.F.R. §0.294 (1973), determined that the FCC was unable to accept WU's application for filing because Section 222 prohibited the applicant as a matter of law from providing the proposed Mailgram service. Letter of Chief, Common Carrier Bureau dated April 19, 1972.

(f) A Petition for Permission to File Additional Pleadings, filed by WUI on August 11, 1972, requesting permission to file a pleading in response to WU's Reply;

(g) Comments of WUI filed August 11, 1972, in response to the WU Reply dated July 25, 1972;

(h) An Opposition to WUI's Petition for Permission to File an Additional Pleading filed on August 28, 1972 by WU; and

(i) A Reply to WU's opposition to WUI's Petition for Permission to file an Additional Pleading, filed by WUI on September 6, 1972.

Positions of the Parties

2. In its Application for Review, WU requests the Commission to review and reverse the Bureau's determination that Section 222 of the Communications Act prohibits WU from providing Mailgram service between the United States Mainland and the State of Hawaii. WU argues that the Bureau incorrectly interpreted the divestment requirement of Section 222(c)(2) too broadly as a pervasive restriction on the scope of WU's activities and that such an interpretation is not warranted by the language of the statute.[2] In support of its contention, WU advances two alternative arguments. First, WU argues

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[2] Section 222(c)(2), the so-called "divestment clause," provides in pertinent part that:

> Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger. . . .

This legislation was enacted to permit WU to acquire its sole domestic competitor, Postal Telegraph Cable Company, and thereby achieve a monopoly position for domestic telegraph operations. For a discussion of the legislative history, see the Appendix hereto.

that the Commission is empowered to authorize re-entry of WU into international telegraph operations. In support of this argument, WU asserts that the statute does not specifically state that WU is barred from any future international telegraph operations; that if Congress had intended such a bar, it would have so stated. WU further claims that the Bureau misinterpreted the legislative history of the statute, and that a correct reading thereof supports its contention that WU may be authorized to provide such international or overseas services as the Commission finds to be in the public interest. WU also argues that the divestment requirement should be narrowly construed since it represents a restriction on its conduct of business and that public policy disfavors such restrictions. Finally, WU argues that, since exclusion is not mandated by the statutory language or the legislative history, a broad interpretation of the provision would unnecessarily frustrate the general regulatory policy of allowing regulatory agencies flexibility in dealing with problems under changing circumstances. Alternatively, WU argues that, assuming *arguendo* that the divestment clause does bar WU re-entry into the international or overseas operations of which it divested itself, that bar would apply only to those telegraph operations "theretofore carried on." [3] WU contends that since Mailgram is a "new service", which it did not provide at the time Section 222 was enacted and which was not among the operations divested, we cannot validly interpret the divestment requirement as a bar to authorizing WU to provide Mailgram internationally, or to Hawaii.

3. WU's request for review is opposed by RCA and WUI, which both urge the Commission to affirm the

[3] *See* footnote 2, *supra.*

Bureau's action.[4] Essentially, the opponents challenge WU's assertion that the Commission is empowered to authorize WU re-entry into international telegraph operations and argue that the only correct interpretation of the divestment clause is as an absolute and permanent bar on any form of international or overseas telegraph operations by WU. Restriction to domestic telegraph operations is, they argue, the price WU had to pay for permission to merge with the Postal Telegraph Cable Co. (Postal). It points out that WU was not required to effect the merger, but voluntarily chose to do so, with knowledge of the divestment requirement. RCA and WUI argue that the absence of a time limit on the divestment requirement, contrary to WU's position, indicates that Congress intended a permanent ban on WU international telegraph operations. Both opponents assert that it is clear from the legislative history that Congress intended WU permanently to be disqualified from competing with the International Record Carriers (IRC's) so long as it had a domestic telegraph monopoly which would enable it unfairly to favor its own international operations. Since WU still has that monopoly, and is still able to favor itself to the detriment of the IRC's, the purposes prompting inclusion of the divestment requirement remain valid and the bar on WU international operations necessary. The opponents also challenge WU's alternative argument on the question of "new" telegraphic services. Since they view Section 222 as a permanent bar on WU international operations, they claim that the "new service" distinction is without merit. They see no support in the statute or its legislative history for WU's interpretation of the statutory

[4] In connection with its Petition to Dismiss, WUI filed a request for waiver of the Rules relating to formal requirements of pleadings. So that we can have the benefits of WUI's views, we grant the request for waiver and accept WUI's Petition for consideration herein.

language "international telegraph operations theretofore carried on." Assuming, however, that WU is correct, RCA argues that Mailgram in any event is not so different from traditional public message telegraph service (PMS) that it could reasonably be classified as a distinct service. RCA points out that mail delivery of telegrams has been provided for in carrier tariffs for many years. In conclusion, the opponents request that the Commission dismiss the WU Application for Review as unwarranted, or to affirm the Bureau's action.[5]

Discussion and Conclusions

4. As disclosed by the pleadings herein, we are faced with the narrow legal question whether the Bureau correctly interpreted the divestment clause of Section 222(c)(2) as a permanent bar to WU international or overseas telegraph operations. In deciding this question we must of course bear in mind the totality of our responsibilities under the Communications Act and the requirements of the public interest, the touchstone standard of this Act. If we find Section 222 a bar, we must uphold the Bureau's refusal to accept WU's application for authority to provide Mailgram Service between the

[5] WU filed a reply to the oppositions reiterating the arguments in its Application for Review and asserting that neither WUI nor RCA had shown anything which disproved its arguments. WUI filed a request for permission to file an additional pleading in response to WU's Reply. This request was opposed by WU and WUI filed comments on WU's opposition. We believe that the complexity of the issues in this case call for a full exposition of the views of interested parties. Accordingly, we grant WUI's request for permission to file a special pleading. The only new argument raised by WUI in this pleading is an attack on an argument in WU's reply that economic factors had coerced it into merging with Postal. Since our decision herein does not turn on the voluntariness of the merger, we do not have to resolve the dispute thus set forth in these pleadings.

United States mainland and Hawaii. At the outset, it is clear that Hawaii is an international point for purposes of Section 222, despite the fact that it is a State. As we held in *Telegraph Service with Hawaii,* 28 F.C.C. 599 (1960), Congress, in drafting Section 222, was concerned with the geographical location of service points, rather than with their political status in classifying them as domestic or international. Moreover, after Hawaii was admitted as a State, Congress amended the Act to provide that it continues to be an international or overseas point for purposes of Section 222. *See* Section 222(a)(10) which excludes Hawaii from the term "Continental United States" as used in Section 222.[6] Further, it is clear that Mailgram is a record, as opposed to voice, service, and hence falls within the Section 222 definition of "telegraph operations."[7] Thus, a grant of WU's application for authority to provide Mailgram service to Hawaii would involve WU in international telegraph operations, and

[6] Public Law 86-624 (July 12, 1960). Prior to the amendment, the section defined "Continental United States" as "the several States and the District of Columbia." Section 222(a)(6) defines "international telegraph operations" as

> acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the *continental United States,* Alaska, Canada, Saint-Pierre-Miquelon, Mexico and Newfoundland. . . . (emphasis added).

By excluding Hawaii from the definition of continental United States, Congress indicated that record communications between the United States Mainland and Hawaii were to be regarded as international rather than domestic.

[7] Section 222(a)(5) defines "domestic telegraph operations" and Section 222(a)(6) defines "international telegraph operations." In both instances, the operative words are "record communications by wire or radio."

would represent the first time WU has engaged in such operations since divestment of its international facilities in 1963.

5. RCA and WUI argue for a broad interpretation of the divestment clause which would impose an absolute and permanent ban on WU international telegraph operations, while WU seeks a narrow construction which would permit it to re-enter the international arena to a limited extent. While we have had occasion in the past to interpret the requirements of the divestment clause, we were there concerned with such matters as whether WU was required to effect divestment[8] or whether it could expand its historical services into areas not previously served.[9] The precise issue raised by the instant pleadings; that is the effect of the divestment clause on proposals to provide a service not covered by the express statutory language, presents a case of first impression. After careful review of all relevant matters, we find nothing in the statute or its legislative history which mandates a broad interpretation of the divestment clause such as to disqualify WU from providing the proposed Mailgram service to Hawaii. From our reading of the statute and its legislative history, we conclude that Congress in enacting Section 222 did not intend to divide the communications market between international and domestic carriers. If it had, then certainly Section 222 would have applied to all carriers present and future, and not just WU. Rather, it simply was seeking to remedy the problems which were facing the troubled telegraph industry in 1943. The restrictions placed on the parties to the merger were ancillary to this main purpose. The restrictions, taken as a whole, were designed only to prevent abuses by WU which might flow from its position as the sole domestic

[8] Western Union Telegraph Co., 25 F.C.C. 35 (1958).
[9] Telegraph Service with Hawaii, 28 F.C.C. 599 (1960).

entity with extensive public message operations in the continental United States. This Congress accomplished in essentially two ways: (1) the divestment clause in Section 222 (c)(2); and (2) the imposition under Section 222 (e)(1) of a formula to govern distribution by it among the IRC's of outbound international message telegrams pending divestment. In construing the divestment clause we must look to the intent of Congress in including it and effectuate that intent. As we view Congressional intent, we do not believe that it requires a sweeping prohibition on WU international operations to prevent abuses. Moreover, we believe that the public interest would be best served by including WU among those who are being considered as potential suppliers of this type of service to Hawaii. Accordingly, for the reasons set forth below, we conclude that the Bureau's action was erroneous, and that WU's Application for Authority should be accepted for filing and consideration on the merits.[10]

6. Under Section 1 of the Communications Act, we have an express duty to assure the people of the United States rapid and efficient communications services at reasonable charges. The rapid growth rate of WU's Mailgram service on the mainland suggests that the service is popular and that it is filling a need. Since its introduction in 1970, WU has steadily expanded the availability and flexibility of Mailgram service. For example, Mailgram service is presently available for messages inbound to the United States from Canada and WU is negotiating for an early

[10] WUI also argues that Section 2.18 of the September 15, 1960 Agreement between it and WU under which WUI acquired WU's international facilities and operations would bar WU from providing Mailgram service to Hawaii. We have considered the language of the clause and do not construe it so.

introduction of outbound service to Canada.[11] Also, WU offers both-way Mailgram service to Alaska through interconnection with RCA Alaska Communications, Inc. We believe that the people of Hawaii are entitled to the benefits of this service, and should not be deprived of the opportunity to have it provided by WU, in the event that we should determine that WU's proposal is superior to other pending applications. Throughout the Communications Act, Congress has made clear that it was not imposing strict limitations on the power of the Commission. Rather it has stated broad legislative goals and given the Commission broad and flexible powers to achieve those goals in the light of changing circumstances.[12] We see nothing in the legislative history of the statute which requires us mechanically to disqualify WU from the chance to provide this service without considering the merits and benefits of its proposal. In the absence of an express statutory bar, we believe the public interest will be served by retaining maximum flexibility to decide the question of Mailgram service to Hawaii.

7. We decide herein only that WU should have the opportunity to pursue its application before this Commission but do not pass on its merits. We note that in addition to the WU proposal, there are pending before us applications for authority to provide a service similar to Mailgram filed by RCA, ITT, WUI ("Telepost"), The Hawaiian Telephone Co. ("Mailgram") in connection

[11] Under Section 222, service between the United States and Canada is considered domestic telegraph operations, 47 U.S.C. *See* § 222(a)(5) (1971).

[12] *See, e.g.,* United States v. Southwestern Cable Co., 392 U.S. 157 (1966), United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

with WU,[13] and the Domestic Satellite Corporation ("Lettergram"). There are both similarities and significant differences among these proposals. Thus, our action only permits WU's application to be considered along with the other applications. The decision as to which carrier or carriers shall be authorized to provide this service to Hawaii will be made by subsequent order, after we have had an opportunity to consider which proposals best serve the public interest.

8. With respect to Section 222, we have previously ruled in considering the domestic satellite applications of RCA and WUI that this Section applies only to record services of the nature "theretofore carried on by WU" at the time Section 222 was enacted in 1943, principally message telegraph service. *See American Satellite Corporation,* 43 F.C.C. 2d 348, 353—354 (1973), *RCA Global Communications, Inc., et al.,* 42 F.C.C. 2d 774, 780 (1973). In our judgment, Mailgram service constitutes a new and distinctly different service from public message telegraph service of the kind Congress was contemplating in 1943. Before amplifying these views, we point out further that insofar as competition to the record carriers is concerned, any entity other than WU would be clearly eligible to seek entry in competition with the record carriers to provide this type of service to Hawaii. On the basis of the record before us, we see no potential for abuses by WU of the type that concerned Congress in enacting the divestment clause. It might well be that in our subsequent review of the applications to provide

[13] At the time Hawaiian's application was filed, Hawaiian had an agreement with WU jointly to provide the service. Since that time, WU has indicated its desire to withdraw from the agreement. Hawaiian has stated that it wishes to pursue its application notwithstanding WU's desire to withdraw.

Mailgram-like service to Hawaii, we will authorize only one carrier to provide that service. In view of the possibility of a single carrier, we would want all applications before us to consider. If, on the other hand, we authorize more than one carrier to provide service, we cannot assume that any competitor will act unfairly. However, if at any time it appears that such problems exist, we have ample authority under the Act to take necessary actions to rectify abuses short of a sweeping prohibition. In other words, we do not construe Section 222 as affording the record carriers any umbrella protection from competition found to be in the public interest on communications grounds.

9. We turn now to our conclusion that Mailgram is a new service distinct from those offered in 1943. While Mailgram is clearly a record service, it has special characteristics that make it different from traditional services. In its Application for Review, WU characterizes Mailgram as "a new innovative service provided by WU under joint arrangement with the United States Postal Service." The salient characteristics of Mailgram is that the delivery function is the responsibility of the Postal Service rather than WU as in the case of PMS. Essentially, Mailgram may be classed as "electronic mail" which combines some aspects of a traditional telegram with those of mail into a hybrid form which is identical to neither. Operationally, Mailgrams are accepted by WU on the Mainland by various means available for pick-up of PMS messages, including telephone (Centralized Telephone Bureau), Telex, TWX, tieline, over the counter, messenger, and facsimile.[14] The Mailgrams are then transmitted over

[14] Mailgrams, but not PMS, may also be filed by submission to WU of specially-prepared magnetic tapes and by direct computer transmission.

telegraph company circuits to its computer switching center in Middletown, Virginia. At Middletown, the computer routes the Mailgrams over circuits specifically dedicated to Mailgram service to a preselected Post Office (called a Serving Post Office or SPO) serving the Zip Code area designated in the address. At the SPO, the Mailgram message is received on a burster teleprinter supplied by WU which prints it on special paper. A Postal Service employee then inserts it into a special envelope and places it in the mails for delivery with the next regular mail delivery. According to WU, the service standard for Mailgram is next business-day delivery, although difference in time zones across the country raise the possibility of same-day delivery in some cases.

10. As we noted above the principal difference between Mailgrams and PMS is that Mailgrams are ultimately delivered by the Postal Service which, accordingly, bears total responsibility for their delivery. WU merely accepts the originating customer's message and transmits it electronically to the SPO. The service is thus subject to the practices of the Postal Service while message telegrams are not. In the case of PMS, however, the customer is seeking rapid, reliable delivery of his message for which a written record is avaliable. For a full-rate telegram, WU is obligated to make a first delivery attempt within five hours of receipt, or the customer is entitled to a refund of the charges.[15] Even for the Overnight Telegram (OT), which might be considered more closely to resemble Mailgram, WU has full responsibility for delivery, a

[15] The standard for messages delivered by telephone or tieline (including Telex and TWX) is two hours and five hours for messenger delivery.

specified time in which to attempt delivery, and an obligation to refund charges if the standard is not met.[16]

11. In the case of Mailgrams, the Postal Service makes no guarantee as to the date or time of delivery, or even that delivery will occur, and does not provide for refunds for non-delivery.[17] The service typically features next

[16] While this class more closely resembles Mailgram service than does the full-rate telegram, there are differences here as well. An OT message is accepted for delivery "not earlier than the following morning." WU Tariff F.C.C. No. 255 at p. 25. An OT is not transmitted to the delivery office until all higher classes have been sent, while a Mailgram generally is transmitted instantaneously to the SPO. OT's are delivered by the various means used for a full-rate message—telephone, tieline, and messenger (upon payment of the $3.00 delivery charge)—while Mailgrams are delivered only by the Postal Service. Thus, OT's may be delivered on Sundays and holidays when there is no mail delivery. Further, in the rare cases where time zone differences permit, Mailgrams can be delivered on the same day they were filed while OT's cannot. WU is required to attempt delivery of OT's by 2:00 P.M. of the day following filing or refund the charges. Finally, the tariff charges for OT's are somewhat higher than those for some classes of Mailgrams ($4.00 for up to 100 words for OT's, as opposed to $2.50 for a Mailgram of the same length) and the name-to, address, and signature are not counted as chargeable words in an OT. We conclude from these differences that OT's constitute a separate service from Mailgram.

[17] For the limited class of Mailgrams filed on magnetic tape or by direct computer transmission, a certified delivery service analogous to certified mail is available upon payment of an additional $.60 charge. Under this arrangement, the Postal Service will (1) obtain the signature of the addressee, or the person at the same address accepting delivery, on a form supplied by the Postal Service to certify delivery has been made, (2) obtain the recipient's signature on a separate Postal Service return receipt form, and (3) forward the receipt to WU for return to the sender. In the event the sender fails to receive the receipt within 30 days, WU's tariff provides that the sender's recourse is against the Postal Service directly in accordance with Postal Service procedures. The certified delivery feature is not available for Mailgrams filed over-the-counter or by telephone or tieline. See WU Tariff F.C.C. No. 260, pp. 7—8 (Rule 4.2.6), 9. 1—10 (Rules 4.3.13 and 4.3.14), and 19(Rule 5.6).

business-day delivery, but the customer requiring positive delivery within a specified time cannot rely on this objective. Further, a significant portion of PMS traffic arises in connection with money orders and for this purpose Mailgrams are presently unsuitable.

12. Acknowledging the basic differences in delivery methods and responsibilities, the charges for Mailgram and PMS respectively differ substantially both as to rate levels and as to pricing practices. The rates for a full-rate message telegram are significantly higher than those for a Mailgram. The basic charge for a full-rate telegram is $4.75 for a minimum of 15 words (with decreasing additional charges for each word over 15) plus a supplemental charge of $3.00 where messenger delivery is specified. For domestic Mailgrams originated by telephone, tie-line, or over the counter, the charge is $2.50 for 100 words or less ($1.00 for each additional block of 100 words or less). For Mailgrams originated over Telex or TWX, charges vary according to rate areas established by WU. Because the same minimum charge applies to any Mailgram of less than 100 words, regardless of the actual number of chargeable words, the wordcount function is simplified or, in many cases, eliminated. In this connection, we note that for Mailgram, but not for PMS, the name-to, address, and signature are classed as chargeable words.[18]

[18] We note that PMS usage has been declining for many years. The IRC's argue that Mailgram has contributed to this decline. While this is no doubt true, the mere fact that for some users Mailgram provides a substitute for PMS, does not mean that it is identical therewith. The decline in PMS is also traceable in part to increased use of Telex, TWX, leased-channel service, telephone, and even air mail. None of the IRC's have argued that these media are therefore the same as PMS.

13. There is attached as an Appendix a Memorandum setting forth the basis for our view that neither the terms nor the legislative history of Section 222 require the conclusion that WU is statutorily barred from seeking authority to provide Mailgram service to Hawaii. This Appendix also discusses various administrative precedents which some of the parties assert to be relevant. Upon consideration of all of the foregoing and the Appendix we conclude that the divestment clause of Section 222 is not a bar to WU's providing Mailgram to Hawaii. We hold that WU's application to provide Mailgram service to Hawaii is acceptable for filing and comparative consideration.[19]

14. Accordingly, IT IS ORDERED, Pursuant to Section 1.115 of the Commission's Rules and Regulations, that the Application for Review of Action taken Pursuant to Delegated Authority filed by The Western Union Telegraph Company in the above-captioned proceeding is, to the extent provided for herein, GRANTED, but is otherwise DENIED in all respects; and that the Chief, Common Carrier Bureau is directed to accept for filing the Appli-

[19] On February 21, 1975, WUI filed a request for oral argument before the Commission *en banc* to consider the general question whether WU is eligible under Section 222(a)(5) of the Act to provide any international telegraph services. Essentially, WUI asserts that such argument would be helpful to place "in clearer focus" the legal concepts in various pending Commission proceedings in which this general question is in issue. After reviewing WUI's arguments, we have determined to deny WUI's request. WUI and the other IRC's have pleaded on numerous occasions their arguments as to the applicability of Section 222 to WU. There is presently before us an adequate record for decision and we do not believe that the requested oral argument will materially assist us. Accordingly, we hereby deny WUI's request for oral argument. *See* FCC v. WJR The Goodwill Station, Inc., 337 U.S. 265, 276 (1949); NLRB v. Allied Distributing Corp., 297 F. 2d 629, 680—681 (10th Cir., 1961).

cation for Authority to provide Mailgram Service to Hawaii filed on April 4, 1972 by The Western Union Telegraph Company.

15. IT IS FURTHER ORDERED, That the Opposition to Application for Review of Action taken Pusuant to Delegated Authority filed by RCA Global Communications, Inc. and the Petition of Western Union International, Inc. to Dismiss or Deny Application for Review are hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

MEMORANDUM ON SECTION 222, ITS LEGISLATIVE HISTORY AND VARIOUS COMMISSION PRECEDENTS

1. The "divestment" requirement underlying the present dispute is part of an overall legislative package in Section 222 which was added to the Act in 1943 to permit the merger of Western Union Telegraph Company (WU) and Postal Telegraph Cable Company (Postal). To place the matter in its proper perspective, it is necessary briefly to discuss the factual situation in which the divestment requirement arose. At the time Section 222 was being considered WU and Postal were the sole remaining domestic carriers providing nationwide public message telegraph service (PMS).[1] After World War I, Postal experienced a long-term decline in its revenues until, by 1943, it appeared to be in danger of bankruptcy. WU also had experienced a steady decline in revenues, but was in a stronger financial position than Postal. Congress was concerned over the state of both the domestic and international telegraph carriers and instituted a study of the industry to determine what should be done to guarantee that the nation would have a viable domestic telegraph message service.[2] Eventually, Congress settled on a merger of Postal and WU as the best means of accomplishing that goal. Therefore, Section 222 was enacted to remove the Section 314 prohibition on mergers of telegraph

[1] The American Telephone and Telegraph Co. (AT&T), in addition to its telephone service, offered record services (TWX and telegraph-grade leased channel services). AT&T's revenues from its record services were sufficient in 1943 to make it the second largest domestic telegraph carrier (after WU). However, AT&T did not provide message telegraph service.

[2] S. Res. 95, 76th Congress, 1st Session (1939).

carriers[3] and allow a voluntary merger.[4] Because the resulting merger would create in WU a domestic message telegraph monopoly, Congress included several ancillary provisions designed to prevent or control abuses it feared could result from that monopoly. It was particularly concerned by the fact that in addition to its domestic business, WU was also engaged in extensive international telegraph operations (through its Cables Division) in competition with the international record carriers (IRC's). Because WU would be able to use its virtual monopoly on the domestic pick up and delivery of international message telegrams unfairly to favor its Cables Division, Congress included the Section 222(c)(2) requirement that after merger, WU should divest itself of the "international telegraph operations" it "theretofore carried on." Congress also provided for a formula for division of international telegraph traffic picked up by WU among the international record carriers. *See* Section 222(e)(1). Pursuant to the divestment requirement, WU eventually sold its international operations to an independent entity that operates under the name Western Union International, Inc. (WUI).

[3] Section 314 of the Act, 47 U.S.C. § 314 (1970), provides that [N]o person engaged . . . in . . . transmitting and/or receiving for hire . . . communications or signals by radio . . . shall by purchase, lease, construction, or otherwise . . . acquire, own, control or operate any cable wire telegraph or telephone line or system between any place in any State . . . of the United States . . . if . . . the purpose is and/or effect thereof may be to lessen competition. . . .

[4] Congress was also concerned about the condition of the international record carriers (IRC's) and proposed legislation to permit them to merge as well. The provisions dealing with the international merger, however, were removed from the bill finally enacted as Section 222.

2. It is apparent from the statutory language that the divestment requirement does not impose upon WU an all-encompassing bar to future international or overseas operations. The operative language provides only that WU must divest itself of the international telegraph operations in which it had "theretofore" engaged. The pertinent question, therefore, is whether the legislative history reflects any intent not apparent in the statute on its face. RCA and WUI argue that there was a Congressional intent permanently to bar WU from international operations, as reflected in the legislative history.[5] However, as we read the legislative history, there appears to be nothing to mandate such a conclusion. Upon consideration of the history discussed below, we are of the view that the divestment provision should be interpreted to apply only to the types of operations engaged in by WU at the time of the merger in 1943. Since Mailgram was not among such services, WU is not barred from being authorized to provide Hawaii Mailgram service.

3. Essentially, WU argues in its Application for Review that the Commission was not deprived of discretion to authorize WU international operations.[6] WU finds support for this position in a recommendation of the Senate Committee on Interstate Commerce for a bill to authorize the telegraph merger. The Committee recommended *inter alia* that the legislation "empower the Federal Commu-

[5] WUI states that the statutory phrase "international telegraph operations theretofore carried on" is "merely descriptive of what was to be divested [by WU]." WUI, however, challenges WU's reading of that language and states that it "cannot reasonably be construed as conferring any rights upon WU to overturn the entire statutory scheme by re-entering or re-acquiring international operations." Petition of Western Union International, Inc. to Dismiss or Deny Application for Review at p. 36.

[6] WU Application for Review of Action Taken Pursuant to Delegated Authority at p. 11.

nications Commission eventually to require the merged domestic carrier to restrict itself solely to 'domestic' telegraph operations if found to be in the public interest. . . ."[7] WU argues that this recommendation was embodied in the divestment requirement and leaves the Commission the power to authorize those international operations it finds to be in the public interest. RCA disputes this view, however, and argues, along with WUI, that the mandatory language appearing in the present divestment clause does not give the Commission any discretion in this regard. We believe that both WU on the one hand, and RCA and WUI on the other, have misread the legislative history.

4. The divestment clause in the present Section 222 cannot be read in isolation. It is the result of many years of Congressional and Commission inquiry into the problems of the telegraph industry and possible solutions for those problems. The question had been studied repeatedly and the consensus was that a merger of Postal and WU, and a separate merger of the international carriers, was the most practicable solution to the problems of the industry.[8] The Commission had prepared two reports—one in 1935[9] and a later one issued in two parts (1) on the domestic telegraph industry (1939) and (2) on the international industry (1940) (collectively, the 1939 report).[10]

[7] S. Rept. No. 769 at p. 25. The quoted language resulted from changes made by the full committee before submission of the report to the Senate. The orginal draft had provided the Commission be empowered "eventually to *permit* the merged domestic carrier to restrict itself to 'domestic' telegraph operations. . . ." (Emphasis added).

[8] *See, e.g.,* Hearings on S. Res. 95, 76th Cong., 1st Sess. (Part 1), (1941) (1941 Hearings) 5.

[9] The text of this report may be found in the Hearings on S. Res. 95, 76th Cong., 1st Session, at pp. 13—21 (1939 Hearings).

[10] The 1939 (domestic) report is printed in the 1941 hearings (Part 2) at pp. 394—450. The 1940 (international) report is printed at pp. 451—481.

In both of these reports the Commission recommended merger legislation. The 1935 report included a recommended draft bill to permit the merger, but that bill contained no provision dealing with divestment of the WU international operations. *See* 1939 Hearings at pp. 14—15. Congress took no action on the proposal until 1939 when it instituted its own study of the industry and directed the Commission to submit a new report (1939 Report). The Commission recommended legislation which would (1) permit WU and Postal to merge, (2) permit the merged carrier to acquire AT&T's TWX and telegraph leased channel services, (3) discontinue the domestic telegraph operations of Mackay Radio Telegraph Co. (now ITT Worldcom) and RCA (which the merged domestic carrier would be permitted to acquire); and (4) permit merger of the international carriers.[11] As is apparent from this proposal, the Commission was recommending a total restructuring of the United States communications industry into a domestic telegraph entity, a separate international telegraph entity and one telephone entity operating in both the international, and domestic spheres. It is interesting to note that neither in the 1939 Report, nor in the amplifying testimony of Commissioners Fly and Craven[12] was there any explicit discussion of whether WU's then operation in both the international and domestic spheres would represent a problem if the

[11] There was also a "minority view" which differed from the majority proposal in that under the recommendation there should be separate mergers of radio telegraph and wire telegraph carriers, rather than one entity comprising both modes of transmission. Also, the minority saw no need for the merged landline carrier to acquire the AT&T leased channel service. *See* 1941 hearings (Part 1) at pp. 219—23.

[12] Commissioner Lawrence Fly testified for the majority and Commissioner Craven for the minority in the hearings held in connection with the 1939 Senate study. *See* 1941 Hearings (Part 1) at pp. 4—27 (Fly) and pp. 218 *et seq.* (Craven).

restructuring proposal was to be implemented; nor was there any discussion of a divestment requirement.[13] The Senate's Report on its 1939 study (S. Rept. No. 769) did, however, make specific recommendations to deal with WU's dual domestic and international operations.[14] This is the language quoted by WU that the Commission be given discretionary power to restrict WU to domestic operations after the merger. From the legislative history two important themes are evident and should be emphasized. First, it is clear that in proposing merger legislation Congress was intending a total restructuring of the industry along the lines of the Commission's recommenda-

[13] Apparently, the Commission looked at the question only in terms of concurrent international and domestic mergers. Presumably, if there were a separate international merger, WU's Cables Division would be merged along with the other IRC's. Absent that merger, there appears to have been no consideration of a divestment requirement applicable solely to WU.

[14] S. Rept. No. 769 at p. 25 provided that: 1. [T]he Congress [should] approve an amendment to the Communications Act of 1934, permitting—

(a) Domestic American telegraph carriers to merge; and

(b) International American telegraph carriers to merge; but with

(c) A proviso that there should be no merger between or common control of domestic and international communications carriers but permitting a merger of domestic carriers into one entity and international carriers into a second and entirely separate and distinct entity; and

(d) The legislation should define "domestic" and "international" carriers and shall not prevent the inclusion of all existing operations of any domestic carrier, which may be engaged partially in international telegraph communications, into the merged skill/domestic enterprise, and shall empower the Federal Communications Commission eventually to require the merged domestic carrier to restrict itself solely to domestic telegraph operations if found to be in the public interest; and

(e) There should be no requirement that the domestic or international mergers be carried out simultaneously or at all.

* * * * * * *

tions and the legislation was to effect that purpose. However, no requirement for a single international entity was ultimately enacted. Second, with respect to WU's international operations, it is clear that the senators were concerned that WU would get from the merger a domestic telegraph monopoly which would allow it unfairly to favor its own Cables Division. It was this potential for abuse that prompted inclusion of the provision empowering the Commission to restrict WU to the domestic sphere. As we read the legislative history, this was the dominant purpose underlying the statute and it is this purpose which we must bear in mind in interpreting the divestment clause.

5. The Committee's recommendations were implemented in a draft bill S. 2445 which was introduced in 1941. That bill contained a divestment requirement (in the event of merger) substantially identical to the version finally enacted:

> Any proposed consolidation and merger of domestic telegraph carriers shall provide for the divestment by [WU] of the international telegraph operations theretofore carried on [by it]. . . .

The bill did not, as the present Section 222 does, define any of the terms used in it. We therefore have no indication of the meaning intended by the phrase "international telegraph operations theretofore carried on." We do have the statement of the bill's drafter, Senator McFarland, that it was intended "to reflect what is contained in Senate Rept. No. 769. . ."[15] After hearings, the Committee reported a substitute bill S. 2598 which also contained a divestment requirement, the operative

[15] Hearings on S. 2445, at pp. 6—7. Senator White, who helped McFarland draft the bill, agreed to McFarland's characterization. *Id.* at p. 7.

words of which were also "international telegraph operations theretofore carried on." *See* S. Rept. No. 1490 at p. 1. The only discussion of the bill in S. Rept. No. 1490 is that the bill "provides for the divestment by the merged or consolidated domestic telegraph carrier of any international telegraph business it may carry on"[16] and therefore sheds little light on the meaning to be given the phrase. The substitute bill limited the merger authorization to domestic telegraph carriers because of the objections of the defense agencies that the disruption attendant upon an international merger would endanger the war effort.[17] There is no discussion in the Committee report of the impact upon the overall restructuring of the industry from deletion of the international merger provisions. Also, there was no discussion of its impact upon the provisions remaining in the bill. Rather, the provisions were simply deleted. S. 2598 passed the Senate and was sent to the House. The House Interstate and Foreign Commerce Committee reported, after hearings, a substitute bill[18] which, *inter alia,* restored the international merger provisions and included a requirement that the merged international carrier divest itself of any domestic telegraph operations.[19] The bill failed in the House for lack of a quorum and died when the Congress came to an end.

[16] *Id.* at p. 9.

[17] *Id.* at p. 8.

[18] *See* H. Rept. No. 2664 at p. 2.

[19] Before World War II, Mackay and RCA engaged in domestic radio telegraph operations. During the war, however, those operations were halted by the War Communications Board on the grounds that radio transmission presented too many problems of security and that the frequencies used were needed for the defense agencies. After the war, those operations were not started again.

6. In the succeeding Congress, the matter came before the Senate again in S. 158. That bill was identical in all relevant respects to bill S. 2598 as passed by the Senate the year before. In reporting this bill to the Senate, the Committee, in S. Rept. No. 13, incorporated by reference the comments and analysis made in S. Rept. No. 1490 relating to S. 2598. S. Rept. No. 13 at p. 1. The bill passed the Senate and was sent to the House. In the House, the divestment clause was removed due to problems which the House believed would render such divestment impossible.[20] After passage in the House, the House and Senate versions were referred to a conference committee to work out the differences between them. The conference committee version of the bill, which is the present Section 222, did not provide for an international merger and restored the WU divestment requirement.[21]

7. As was the case with its predecessors, the Conference Committee report sheds no light on the meaning to be given the phrase "international telegraph operations theretofore carried on" and we must therefore assume that the phrase was intended to have the same meaning as it did in earlier versions of the language. Our only clue to the meaning of the phrase is the statement in S. Rept. No. 1490 (reporting S. 2598) that the divestment clause "provides for the divestment by the merged or consoli-

[20] The House report on this bill (H. Rept. No. 69) does not state the reason the provision was deleted, but we can assume that the remarks in H. Rept. No. 2664 (reporting S. 2598) are applicable to this matter. In H. Rept. No. 2664, the House Committee stated that the provision was deleted since it was felt the existence of the Anglo leases would prevent divestment. In 1943, WU held five 99 year leases for transatlantic submarine cables from the Anglo-American Cable Co., Ltd. Provisions in the leases forbade assignment of the leases to anyone other than an assignee who also was assigned WU's domestic landline system.

[21] *See* H. Rept. No. 142.

dated domestic telegraph carrier of any international telegraph business it may carry on." S. Rept. No. 1490 at p. 9. From this language it appears to us that the phrase in the divestment clause is no more than a descriptive phrase defining the operations which WU was to be required to divest in return for merger with Postal. In this we agree both with WU and with WUI. However, we disagree with both parties as to the significance of this language with respect to future WU international operations.

8. Neither in the statutory language nor in the legislative history is it clear that WU is forever barred from all types of international operations or that, once divested of prior operations, WU was thereafter free to re-enter the same operations. Congress simply appears never to have addressed the question. This is not surprising considering the circumstances with which Congress was then dealing. The telegraph industry had been relatively static for many years; except for the persistent decline in revenues. Congress could not expect that teletypewriter exchange service (Telex and TWX) or leased channel services, which accounted for very minor portions of telegraph company revenues in the 1930's, would in later years become the dominant services and that the revenues therefrom would grow at such a tremendous rate. Rather, Congress was dealing with the industry in its contemporary pattern. While Congress provided a comprehensive scheme covering the narrow situation before it, it gave no indication of an intent to legislate for future situations involving different technology and service patterns or to supersede other pertinent sections of the Act. In the absence of any provisions or discussion dealing with the situation presented by WU's Hawaii Mailgram proposal, we must construe the provisions of Section 222 in the light of the scheme of

the Act as a whole, where Congress did set forth broad guidelines and gave us ample authority and discretion to deal with evolving circumstances.

9. To recapitulate, while we do not find the legislative history to be of much help in construing the language of the statute—"international telegraph operations theretofore carried on"—it does appear that the fundamental purpose of the divestment requirement was to protect against abuses which could follow upon the merger as a result of WU's position as the sole domestic pick-up and delivery agent for PMS traffic in the United States. Congress feared that WU would be able to use its domestic monopoly position unfairly to favor its international Cables Division in competing with international carriers in providing PMS service (which constituted virtually their entire business). Since the international carriers in 1943 operated only in the gateway cities, they were dependent on WU for the bulk of the domestic pick up and delivery of their PMS traffic. Thus, WU was in a position virtually to drive an international carrier or carriers out of business were it so inclined. It was in this context that Congress required WU to divest itself of its international operations and enacted the formula provisions. We agree with WUI and RCA that a construction of the divestment provision which would permit WU to re-enter the same international operations the day after it divested its prior operations would render the requirement meaningless and absurd. It makes no sense, in view of the purpose underlying the divestment clause, to require divestment if WU could re-enter international PMS operations in competition with the IRC's. However, we are not dealing here with a proposal for WU to provide PMS to Hawaii. After considering the policy of the divestment requirement, we conclude that the divestment clause required WU to divest itself of the international operations it was engaged in at the time of the merger, primarily PMS, and does not deprive this Commission of discretion to authorize WU to provide overseas points with new services that were not within the contemplation of Congress in 1943.

10. Nor are prior decisions of this Commission relied upon by RCA and WUI contrary to the view announced herein. Both WUI and RCA urge that our decision in *Western Union Telegraph Co.* (Divestment II), 25 F.C.C. 35 (1958), *order set aside and remanded sub nom, Western Union Telegraph Co. v. United States,* 267 F. 2d 715 (D.C. Cir. 1959), requires WU forever to be limited to domestic operations. We do not agree with this conclusion. The divestment order in question was issued as the decision in Docket No. 10151. Pursuant to the divestment requirement in Section 222(c) (2), the Commission's order approving the domestic telegraph merger, *Application for Merger of Western Union and Postal Telegraph,* 10 F.C.C. 148 (1943) (Docket No. 6517), we ordered WU to divest itself of its operations within one year. *Id.* at 154. We recognized the difficulties represented by the Anglo lease and World War II and provided that WU could request extension of that time so long as it exercised the required due diligence in effecting divestment. Extensions of time were granted until 1952, when we instituted an inquiry (Docket No. 10151) to determine the nature and extent of WU's efforts to divest itself of the international operations, any impediments that existed thereto, and whether the Commission could or should prescribe a plan of divestment (or should modify the requirement in some way). *Western Union Telegraph Co.* (Divestment I), Order released March 6, 1952, quoted in 25 F.C.C. 35 at pp. 35-39. After hearings, we concluded that WU had not exercised due diligence in effecting divestment, 25 F.C.C., at 84, and directed it to file a plan

of divestment within six months of the release of the order, *Id.* at p. 90.[22] The factual situation in which that case arose was that eight years after the merger and our divestment order, WU was still operating its international facilities without appearing to have made diligent efforts to comply with our order. Therefore, our basic concern was the discharge of our statutory duty to enforce the divestment requirement and whether WU could comply in view of its legal obligations. As we noted, Congress drafted the divestment requirement with full awareness of the Anglo lease and had concluded that it did not present an insurmountable obstacle. In ordering divestment, we concluded, therefore, only that Congress intended WU to divest itself and that WU was able and required to comply with that requirement. The case does not stand for the proposition that WU could never offer any form of international services—the question simply was not at issue there.

11. By the same token, *Western Union Telegraph Co.* (Divestment III), 30 F.C.C. 323 (1961) (Docket No. 6517), where we approved the divestment plan submitted pursuant to Docket No. 10151, does not hold that there is a permanent bar to any WU international operations. That case involved a proposal that WU acquire 250,000

[22] The Divestment II order was appealed by WU, Western Union Telegraph Co. v. United States, 267 F. 2d 715 (D.C. Cir.) (1959). The court upheld the Commission's power to require WU to file a plan of divestment, but set aside our order and remanded the matter to the Commission because it felt we had exceeded our authority in requiring a plan by a date certain without regard to whether "due diligence" could secure such a plan. The Commission could, said the Court, require WU to file a plan after due diligence had produced a viable one, or we could direct it to submit conditional plans by a date certain subject to agreement of lessor to an assignment of the leases without the landline system.

shares of Class B stock in Western Union International, Inc. (the corporate name under which the American Securities Corp. would purchase and operate WU's international operations). We held that WU could not hold this stock consistent with the divestment requirement in Section 222(c) (2), even though WU would not thereby have any influence on the new company since the Class B stock had no voting rights. Our decision turned not only on the requirement that WU divest itself of the operations it carried on in 1943, but also on the prohibition in Section 222(b) (1) on WU acquisition of any interest in an international telegraph carrier.[23] As the stock plan would clearly result in WU's retention of a direct financial, if not a management, interest in its former international operations (thus not achieving the complete divestment called for by the statute) and would also amount to acquisition of an interest in an international telegraph carrier (in violation of the explicit language of Section 222(b) (1)), the plan ran afoul of Congressional intent. In the present case, neither of these problems exist. WU proposes to provide Hawaii Mailgram without participation of any IRC and does not propose to use any ficilities of which it divested itself. Thus, there is neither a retention of WU's prior interest in international operations nor acquisition of an interest in an international telegraph carrier.[24]

12. It bears noting that one of the objections to the stock plan was that it would complicate unduly, or

[23] *See* 30 F.C.C. at 340-1.

[24] We note the stock plan in question in the Divestment III case provided that, as a separate transaction. WU could purchase the stock for $100,000. For this reason, the stock was not part of the consideration for its Cables Division but represented a separate acquisition of stock.

possibly frustrate, the potential merger of the international telegraph carriers, authorization of which was then being considered in Congress with the active support of the Commission. We stated that the mandatory redemption feature of the Class B stock[25] would create severe problems in the event of an international merger, no matter who held the stock, and could therefore frustrate the merger and the public interest benefits to be derived therefrom. As we have seen from the legislative history, the international merger was an integral part of what Congress hoped ultimately to achieve through Section 222. In view of all these considerations, the decision not to permit WU to own stock in WUI is based on reasons not applicable to the instant situation and that decision does not stand as a bar to consideration of WU's application.

13. WUI also relies on our decision in *Telegraph Service with Hawaii,* 28 F.C.C. 599 (1960) (Docket No. 13188), to support its contention that WU is limited to domestic operations. After Hawaii's admission as a State, WU indicated that it desired for the first time to offer its traditional telegraph services between Hawaii and the United States Mainland. WU indicated that it desired to do so only as part of its domestic telegraph operations and contended that Hawaii's admission as a State, had made it a domestic point. By Order released September 9, 1959, F.C.C. 59-916, we instituted an inquiry to determine what changes we should recommend Congress to make in the Act to deal with WU's proposal. The problem under

[25] The agreement stated that at any time in the event of dissolution, voluntary or otherwise, of WUI, Class B stockholders were to receive $10.00 per share from the assets of WUI available for distribution to stockholders, and only after this had been paid in full could other stockholders share in any remaining assets. The Class B stock was also subject to a redemption feature under which WUI could redeem the stock at any time for $10 per share. *See* 30 F.C.C. at 339.

consideration arose from the following facts: As enacted, Section 222(a) (6) defined "international telegraph operations" as those between any point in the world and "the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland." The term "continental United States" was defined (Section 222(a) (10)) as "the several States and the District of Columbia." In 1943, Hawaii (as a territory) was not part of the "continental United States" and communications between Hawaii and mainland fell within "international telegraph operations." In view of these definitions, Hawaii's admission as a State would appear automatically to have changed Hawaii to a domestic point since it would now be within the definition of "continental United States." We were not convinced Congress had intended such an automatic change in the existing pattern of service and concluded that, if such a change were to be made, it should come about only after consideration of the impact on the public interest. Although WU characterized its proposal as expansion of its domestic telegraph operations, we regarded it as actually involving international telegraph operations.[26] We concluded that, as used in Section 222, the distinction between international and domestic service points was drawn on geographical rather than political lines, and that Hawaii's change in political status was irrelevant for purposes of its status under the divestment clause.[27]

[26] Indeed, WU had stated that it was uninterested in the proposed expansion if it would be considered part of its international operations which it was then under an order to divest at the earliest possible date.

[27] We noted in that case that even when Hawaii was a territory, communications between it and the mainland were "interstate communications" under Section 3 of the Act for purposes of the Commission's jurisdiction. We concluded that the inconsistency between that designation and its treatment under Section 222 was significant and indicated an intention to base its classification on other than political considerations. *See,* 28 F.C.C. at 605.

14. Thus, if WU were authorized to serve Hawaii with its traditional services, that service would be included in its international operations and would be subject to our divestment order. Also, the *Hawaii Service* case stated that we would not recommend to Congress a change in the Act to permit Hawaii to be treated as a domestic point. 28 F.C.C. at 616. Further, we determined to recommend changes which would make clear that Hawaii should not be treated as a domestic point for purposes of Section 222. In 1960, Congress adopted our recommendation and amended the Act specifically to exclude Hawaii as within the continental United States.[28] We reached our conclusion by looking to the policy which the distinction between international and domestic operations was to serve. In connection with that policy we stated that

> [WU] carried on . . . oversea service [N.B., to points other than Hawaii, since WU did not serve Hawaii prior to the adoption of Section 222] in competition with a number of other telegraph carriers which were primarily engaged in such oversea service. Since these latter carriers had only limited facilities for the collection of traffic from, and delivery of traffic to, the public on the U.S. Mainland, they were dependent on and had contractural arrangements with either Western Union or Postal Telegraph for the collection and delivery of their traffic at places they did not serve.

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[28] On December 22, 1959 we had recommended that Section 222(a)(10) be changed to define continental United States as "The District of Columbia and the States of the Union except Hawaii." In the Hawaii Service case, we "reiterate[d] the aforementioned recommendation." 28 F.C.C., at 616 by Public Law 86-264, 74 Stat. 411. *See*, 47 U.S.C. §222(a)(10) (1971).

12. . . . Congress was concerned, among other things, that after such merger . . . [WU] would be able to favor either its own cable system or a particular oversea carrier, to the detriment of others with respect to pickup and delivery at mainland points not served by the limited facilities of such carriers.

13. To prevent this, Congress determined that Western Union should divest itself of its oversea telegraph operations (that is, in which it competed with these carriers), and further determined that Western Union should distribute equitably among these oversea carriers such traffic as was filed with it for delivery at points they served outside the U.S. mainland.

15. In response to WU's argument that Hawaii's status had changed, we observed further that "as a consideration to its merger with Postal Telegraph, Western Union, as a domestic telegraph carrier must withdraw from competition with the international telegraph carriers to oversea points, whether they be foreign points or interstate points under Section 3." 28 F.C.C., at 604. From this language, it is apparent that we were concerned in the *Hawaii Service* case, as we are herein and as Congress was in enacting the divestment requirement, with the potential for abuse which WU's postion both as the sole pick up and delivery agent for the IRC's and as one of their competitors. It is for this reason that we rejected WU's proposal to serve Hawaii with PMS and other similar services and recommended changes to the Act which would preclude WU from offering competitive services to Hawaii. That holding, however, was limited to the particular services involved in WU's proposal which were being provided by the IRC's. Thus, we do not find our holding there inconsistent with our present interpretation.

16. We are concerned here, however, with a new service which is not currently offered by any carrier between the mainland and Hawaii. We have competing applications in which all applicants, including WU, are equally situated; where the public interest may be measured without regard to benefits or detriments attendant upon the 1943 merger. Therefore, the concerns we expressed in the *Hawaii Service* case, *supra.*, do not speak to the present facts. It is not our function to shield the IRC's from competition. Our concern in this regard is to assure that all carriers act fairly toward the public and one another. This we can do within the broad powers given us by Congress to regulate in the public interest. We see no need in this matter to pronounce sweeping prohibitions on the activities of a carrier which are not mandated by the statute and which may be detrimental to the public interest.

17. In conclusion we point again to the precedents we consider most relevant to the present situation. Thus, in our domestic satellite authorizations we expressly held that Section 222 applies only to record services of the type offered by WU in 1943, principally PMS. *American Satellite Corporation,* 43 FCC 2d 348, 353 (1973), *RCA Global Communications, Inc.* 42 FCC 2d 774, 780 (1973). Moreover, in our *Second Report and Order* in Docket No. 16495, 35 F.C.C. 2d 844 (1972), which promulgated the policies governing domestic satellite operations, we determined that the rates and services between Hawaii and the mainland should be integrated into domestic rate patterns, 35 F.C.C. 2d at 857-858. We stated that in the event that the record carriers did not achieve satisfactory compliance with this requirement, we would consider authorizing the provision of these services by another carrier such as AT&T or GTE Satellite Corporation. Section 222 has no

applicability to any domestic carrier other than WU and does not preclude competition to the IRC's in the provision of Hawaii/Mainland service. This fact is significant in considering the impact of the divestment clause. Had Congress intended to divide the telegraph industry into domestic and international spheres and to preclude a carrier from operating in both spheres, it would have done so by a provision more tailored to achieve that goal than the divestment clause. The fact that Section 222(c)(2) does not provide for the advent of new carriers, but deals only with the then international operations of one carrier suggests that this was not Congress' intent. As we have said, Congress in enacting Section 222 was facing a specific situation and dealing with particular entities. The statute it enacted attempted to deal with only that situation. Congress did not attempt thereby to anticipate changing circumstances and the advent of new communications services; and it did not attempt to preclude the provision of such services by any carrier.

CONCURRING STATEMENT OF COMMISSIONER CHARLOTTE T. REID

(Re Western Union's application to extend mailgram service to Hawaii)

The citizens of Hawaii are clearly entitled to Mailgram service and I fully agree with my colleagues that this obviously attractive service should be forthcoming.

But, in my opinion, the plain language of Section 222 of the Act raises questions about the legality of Western Union providing such service to Hawaii. Hawaii, by the terms of Section 222(a) (6) and (10), is excluded from the definition of domestic points. It also bothers me that Congress saw fit to amend Section 222(a)(10) to specific-

ally except Hawaii from the definition of "continental United States" in 1960[1] (subsequent to the time Hawaii became a State).

I realize that, as it pertains to Hawaii, the distinction between domestic and international services has become somewhat blurred. This is illustrated by our "domsat" decision as well as our decision allowing AT&T to provide alternate voice-data service to Hawaii. Nevertheless, I would have opted for the more conservative route of removing any legal impendiment to our action by amendment of Section 222 prior to acceptance of Western Union's application. I note that the Commission intends to ask Congress to make this adjustment in the very near future.

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[1] Pub. L. No. 86-624, approved July 12, 1960.

APPENDIX E

Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. §151

§ 1. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

* * *

Section 2(a) of the Communications Act of 1934, as amended, 47 U.S.C. §152(a)

§ 2. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States

in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but is shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

* * *

Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214

§214. Extension of lines; certificate of public convenience and necessity; discontinuance of service

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided,* That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further,* That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall

first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however,* That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise

only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this Section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in iterest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint, or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

* * *

Section 222 (a), (b) and (c) of the Communications Act of 1934, as amended, 47 U.S.C. §222 (a), (b) and (c)

§222. Consolidations and mergers of telegraph carriers Definitions

(a) As used in this section—

(1) The term "consolidation or merger" includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease, or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or of the control thereof, in exchange for its own securities, or otherwise.

(2) The term "domestic telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from domestic telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(3) The term "international telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(4) The term "consolidated or merged carrier" means any carrier by wire or radio which acquires or operates the properties and facilities unified and integrated by consolidation or merger.

(5) The term "domestic telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points within the continental United States,

Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland and terminate or originate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland, and includes acceptance, transmission, reception, or delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into and points of destination within, the continental United States with respect to record communications by wire or radio which either originate or terminate outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, and also includes the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States: *Provided,* That nothing in this section shall prevent international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States.

(6) The term "international telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, but does not include acceptance, transmission, reception, and delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into, and points of destination within, the continental United States with respect to such communications,

or the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States.

(7) The terms "domestic telegraph properties" and "domestic telegraph facilities" mean properties and facilities, respectively, used or to be used in domestic telegraph operations.

(8) The term "employee" or "employees" (i) shall include any individual who is absent from active service because of furlough, illness, or leave of absence, except that there shall be no obligation upon the consolidated or merged carrier to reemploy any employee who is absent because of furlough, except in accordance with the terms of his furlough, and (ii) shall not include any employee of any carrier which is a party to a consolidation or merger pursuant to this section to the extent that he is employed in any business which such carrier continues to operate independently of the consolidation or merger.

(9) The term "representative" includes any individual or labor organization.

(10) The term "continental United States" means the District of Columbia and the States of the Union, except Hawaii.

(b) (1) It shall be lawful, upon application to and approval by the Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger; and for any domestic telegraph carrier, as a part of any such consolidation or merger or thereafter, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier: *Provided,* That, except as provided in paragraph (2) of this subsection, no domestic

telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

(2) As a part of any such consolidation or merger, or thereafter upon application to and approval by the Commission as hereinafter provided, the consolidated or merged carrier may acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any international telegraph carrier.

(c) (1) Whenever any consolidation or merger is proposed under subsection (b) of this section, the telegraph carrier or telegraph carriers seeking authority therefor shall submit an application to the Commission, and thereupon the Commission shall order a public hearing to be held with respect to such application and shall give reasonable notice thereof, in writing, and an opportunity to be heard, to the Governor of each of the States in which any of the physical property involved in such proposed consolidation or merger is situated, to the Secretary of State, the Secretary of Defense, the Attorney General of the United States, representatives of employees where represented by bargaining representatives known to the Commission, and to such other persons as the Commission may deem advisable. If, after such public hearing, the Commission finds that the proposed consolidation or merger, or an amended proposal for consolidation or merger, (1) is authorized by subsection (a) of this section, (2) conforms to all other applicable provisions of this section, (3) is in the public interest, the Commission shall enter an order approving and authorizing such consolidation or merger, and thereupon any law or laws making

consolidations and mergers unlawful shall not apply to the proposed consolidation or merger. In finding whether any proposed consolidation or merger is in the public interest, the Commission shall give due consideration, among other things, to the financial soundness of the carrier resulting from such consolidation or merger.

(2) Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any, of the carrier to be so divested will permit. The Commission shall require at the time of the approval of such consolidation or merger that any such party exercise due diligence in bringing about such divestment as promptly as it reasonably can.